

IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-6314

JAMES ROY GOSA,

Petitioner,

—VS.—

J. A. MAYDEN, WARDEN,

Respondant.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA

JAMES R. GOSA, PETITIONER

vs.

J. A. MAYDEN, Warden, Federal Correctional
Institution, Tallahassee, Florida, RESPONDENT

CLOSED

Bases of action Petition for writ of habeas corpus

Jury trial claimed by
on, 19

For Plaintiff:

For Defendant:

Clinton Ashmore
United States Attorney
P. O. Box 1308
Tallahassee, Florida

DATE	PLAINTIFF'S ACCOUNT
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8/21/69	Forma Pauperis
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DATE	FILINGS-PROCEEDINGS
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8/21/69	Filed Rule to Show Cause with related papers, Application for Writ of Habeas Corpus, interrogatories and pauperis affidavit. har
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8/21/69	Mailed Certified copies of Order to Show Cause to Petitioner, and United States Attorney, N.D. of Fla. J.S. 5 har
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DATE	FILINGS-PROCEEDINGS
9/12/69	Filed Respondent's, J. A. Mayden, Warden, FCI, Answer and Response to Rule to Show Cause. har
9/17/69	Filed Petitioner's Answer and Traverse to Respondent's Answer to Rule to Show Cause. har
11/14/69	Filed Order denying petition for writ of habeas corpus. har
11/14/69	Certified copies of Order denying petition mailed to petitioner and respondent. J. S. 6
12/18/69	Filed Notice of Appeal
12/18/69	Mailed certified copy to petitioner, and U. S. Attorney (ats)
12/23/69	Certified copy of Notice of Appeal and docket entries mailed to 5th Circuit Court of Appeals. (tgd)
1/23/70	Clerk's Certificate
1/23/70	Original court file as record on appeal mailed to 5th CCA, New Orleans. (har)

15AF—REVIEW OF THE STAFF JUDGE ADVOCATE

UNITED STATES

v.

AIRMAN THIRD CLASS JAMES R. GOSA
10 March 1967

1. EVIDENCE.

a. For the Prosecution

On 13 August 1966, Shirley Ann Borden, age 20, was living at 2114 Russell Street in Cheyenne, Wyoming. That evening she had been visiting at Ed Loetcher's house. She left there and started home at approximately 11:30 in the evening. As she was walking along Van Lennen near 22d Street, she was approached and grabbed around the neck by a man later identified as the accused. Miss Borden was told by the accused not to scream or he would kill her. The accused then dragged Miss Borden to an alley, behind a garage, and raped her. The lighting was sufficient for Miss Borden to get a good look at the accused. Miss Borden had screamed before the accused started choking her, and she stopped screaming because she was in fear of her life. Miss Borden noted that the accused had on white boxer shorts and she was sure that there was actual penetration. After the act of sexual intercourse had occurred, the accused got up and left. Miss Borden got dressed and on walking out of the alley saw some patrolmen. She told them "I was just raped". She had some scratches on her knees and a nosebleed. After Miss Borden was taken to the hospital for a physical examination, she was taken to the police station where she identified the accused. The identification was made by the accused's clothing. He had on a maroon corduroy jacket and grey slacks (R. 14-18). After the accused had pushed Miss Borden to the ground, he started taking off her shorts and her underpants. After he had "got in a little ways," she remembered that she was wearing Tampax and he took it out. The accused was choking Miss Borden so as to cut off her

wind and she was having trouble getting her breath (R. 26, 28). Miss Borden's shorts were taken off by the accused and there was penetration both prior to and subsequent to the removal of the Tampax. Miss Borden had never seen the accused prior to the night of August 13, 1966. In addition to the street light there were lights on in a house nearby and there was a bright moon (R. 31-34).

Curtis J. Renfro is a patrolman in the Cheyenne Police Department. Just prior to midnight on 13 August 1966 when he was in the squad room preparing to go on duty, the desk reported that there had been a call for help as a woman was reported screaming in the alley in the 500 block of East 22d Street. Officer Renfro dispatched two cars and proceeded to the area himself. Renfro talked with the complainant and was advised that the screams had come from the alley across the street. He proceeded to the area where he contacted Sergeant Lamb, and as he was talking to him, Miss Borden walked out of the alley and approached them. Her first statement was "I was just raped". Officer Renfro noted that there was blood on Miss Borden's face and nose and mouth. She gave him a partial description of the individual and that information was relayed to other units in town to be on the lookout. Officer Renfro took Miss Borden to the hospital. Following the examination, he took her to police headquarters where she identified the accused in his presence. Renfro noted that Gosa's jacket was missing some buttons and that there was blood on one of his sleeves and soil on the knees of his trousers. At the hospital he had observed leaves and grass being removed from Miss Borden's hair (R. 41-44).

Prior to joining the Cheyenne Police Department, Sergeant Albert Lamb had been employed by Scotland Yard. On 13 August 1966, he was on duty on the 4 p.m. to midnight shift and as he was going off duty a call was received reporting that a female was screaming in an alley between Van Lennen and Evans at 22d and 23d Streets. He proceeded to the area with Lieutenant Nelson who was chief of the Patrol Division. They arrived at the scene shortly after midnight. About fifteen minutes after

midnight Sergeant Lamb saw a female running down an alley toward him and Officer Renfro. This female identified herself as Shirley Borden. She had a lot of blood on her face, was in an hysterical condition, and at the time stated "I've been raped". She described the subject as a male Negro with short curly hair, wearing a corduroy jacket and dark pants. About a half an hour later Sergeant Lamb was advised that a police dog had picked up the scent of the subject and was going north on Van Lennen towards Pershing. At that time Sergeant Lamb and Lieutenant Nelson headed the dog in an attempt to intercept the subject. As they pulled up to the gate of Francis E. Warren Air Force Base, they noticed the accused, who fit the description given by Miss Borden, approaching the gate. He was asked to come over to the police car and Sergeant Lamb noticed the knees of his pants were soiled with mud and dirt. Gosa was taken to the police station where he was identified by Miss Borden. Sergeant Lamb noted what appeared to be mud on Gosa's shorts, a slight trace of what appeared to be dry blood on the fly of the shorts, and on the inside of the fly of the pants he was wearing (R. 49-52).

Robert A. Bigley is an OSI special agent assigned to Detachment 1402. On 10 October 1966 he questioned the accused relative to an allegation that he had raped a girl residing in Cheyenne on or about the night of 13-14 August 1966. Prior to questioning Gosa on the matter, Special Agent Bigley advised him of his rights under Article 31. He further advised him that he did not have to make any statement concerning the matter, that he had a right to a lawyer, and that if he did not have a lawyer, the Air Force would appoint one for him. Gosa was further advised that he had a right to have a lawyer present during the interrogation, that he was free to take a break during interrogation, and to smoke if he liked. Gosa advised Agent Bigley that he understood his rights under Article 31 and that he did not desire to have a lawyer present during the interrogation (R. 57-58). At no time during the interrogation did Special Agent Bigley indicate to the accused that things

would go easy on him if he confessed to raping Miss Borden. Neither did Bigley ever tell the accused that if he went on trial he wouldn't have a chance, that he would be found guilty. Agent Bigley further did not indicate to Gosa that if he would give an oral or written statement, Bigley would do what he could to see that the accused was sent to Fitzsimons Army Hospital in lieu of a court-martial. No pressure was applied in getting Gosa to make an oral admission (R. 116). Gosa advised Mr. Bigley that in the late afternoon or early evening of 13 August he had played touch football with several other airmen in the squadron. This game terminated about dusk and Gosa went to his barracks and lay down because he was suffering from a headache. He either blacked out or passed out. Later in the evening Gosa was awakened by another airman. He got up, showered, and departed for downtown Cheyenne. After he got downtown he went to the Twin Sisters Cafe and saw several other airmen. He drank some wine with them. He left the cafe and started walking but was not really sure where he was. When he noticed a girl approximately half a block away from him on the opposite side of the street, he thought the girl looked like a girl named Charlotte whom he had previously met. He called out to her but she gave no indication that she heard him. However, she did cross the street and continue walking on the sidewalk on the same side of the street that he was on. Gosa stated that he walked up behind the girl, grabbed her by one arm around the waist, spun her around, and dragged her to a nearby alley. When he got to the alley he removed his jacket, put it down on the ground and raped the girl on the spot. Upon completion, he arose, pulled up his trousers, and departed. On reaching the street, he turned right and started walking towards Francis E. Warren Air Force Base. After he had walked approximately a block, he turned around and saw the girl standing in the alley entrance and heard her screaming (R. 123-125).

Special Agent Charles A. Schulter of the Office of Special Investigations, was present when Special Agent Bigley, was interviewing the accused on 10 October 1966.

At no time were any inducements offered to Gosa, nor was he told that things would go easy for him if he made a statement. Nothing was said about trying to see that Gosa was sent to Fitzsimons Army Hospital in lieu of a court-martial. Gosa was very vague on some of the details of the incident but he did admit that he had raped the girl. The following day Gosa was then advised of his rights and declined to execute a signed sworn, statement because he felt it would speed up court-martial proceedings and he would be sent to prison sooner (R. 128-130).

Mrs. Isabel L. Bentley is a school teacher who resides at 20 East 22nd Street, Cheyenne. On 13 August 1966 she had retired shortly after 11:00 p.m. and had just dozed off when she was awakened by a terrible scream. The screams were also heard by Mr. Bentley and he jumped up and opened up the back door of the house. Mrs. Smith, the next door neighbor, opened her door at the same time and as a result of the discussion between the Bentleys and Mrs. Smith the police were called. Very shortly after that, Mrs. Bentley saw a figure come across Mrs. Lawlor's front yard. Mrs. Bentley could see pants legs so she assumed that it was a man who appeared to be carrying something. The figure went up on Mrs. Lawlor's porch and then came down and went between Mrs. Lawlor's and Mrs. Rayor's house. When the police arrived they were directed to the alley between Lawlors and Rayors. The figure that Mrs. Bentley saw walking appeared to be carrying something that looked to Mrs. Bentley like a person.

b. For the Defense.

On cross-examination of Miss Borden, the defense ascertained that that evening she was dressed in shorts with a short top that just came down around the waist. As she was walking down the street, the accused started walking behind her on the sidewalk. She did not speak to him and Gosa did not say anything to her. Miss Borden was running and after she had ben grabbed by the accused, she screamed. She was quiet all the time except when she screamed, and was really in fear of her life.

The total length of time from when Miss Borden was grabbed by Gosa until he went away was about ten minutes. Both Miss Borden's shorts and pants were off. They had been removed by the accused. The zipper on the shorts was broken and they were held up by safety pins which had to be removed to take off her shorts. Miss Borden told Gosa about the safety pins. Other than scratches on her knees and a bloody nose, there were no other scratches or marks on Miss Borden. She has frequent nosebleeds. If the accused had had on other clothing, Miss Borden would not have been able to identify him. Other than Ed Loetcher and her parents, Miss Borden had not told anyone about the incident. Miss Borden did not appear at court downtown because she did not want the publicity and she didn't want to get Loetcher involved in it. Further, she was supposed to be out of town because the police had told her to leave. She had been convicted of shoplifting in May of 1966. Other than telling Gosa where the safety pins were located and advising him of the presence of Tampax, she had no other words with the accused because it wouldn't have done any good if she had said anything. Miss Borden did not assist in removing her clothing at all. Subsequently, Miss Borden was not sure who had removed the Tampax (R. 28-30).

The defense elicited from Officer Renfro that the telephone call relative to this incident was made from a site about six blocks from the police station. There were several calls made and one was from across the street. Miss Borden's clothing did not indicate that she had been involved in some degree of violence. They did not look mussed.

On cross-examination Special Agent Bigley indicated that the last time he had seen the accused on 11 October, the accused advised him that he did not desire to make a written statement because he was afraid that if he did make a statement, it would speed up his court-martial and he would be sent to jail. Gosa further indicated that he would do anything to stay out of jail and send money home to his parents and younger brother who needed monetary assistance. Although the father was not

hospitalized at that time, he had suffered from several heart attacks (R. 118-119). At the time Agent Bigley was questioning the accused he had Miss Borden's statement which he used to assist in his interrogation. Gosa did not sit down and dictate a long detailed story without being questioned as to details by Agent Bigley (R. 125-127).

During Agent Schulter's and Bigley's interrogation the accused appeared to be nervous and somewhat emotional but he did not break down at any time. The accused was not arrogant at all. During the interrogation the accused told at least three stories but was unable to give the investigators any substantial information as to whom they could interrogate to substantiate these stories. The story Agent Schulter reiterated to the court was said by Gosa to be true and he denied the truth of any of the other stories (R. 130-138).

On cross-examination Mrs. Bentley indicated that she was not sure of the sex of the person she saw walking but she saw pants legs and a "kind of a shape of a man's head". Nor was she sure that the object being carried by this walking figure was a person or not (R. 140).

The accused testified under oath that in the late evening on 13 August 1966, he was downtown in Cheyenne and saw a girl walking down the street. He thought he recognized her as a girl he knew as Charlotte. He called to her but there was no indication that she had heard him so the accused proceeded down the sidewalk and caught up with her. They continued walking and talking in general terms and the accused commented that he knew of Charlotte's involvement in an incident with another airman. On receiving no indication that the girl knew what he was talking about, he told her of the incident and asked her what she would do. Receiving no comment, Gosa took the girl's hand and walked into an alley and had sexual intercourse with her. As Gosa was leaving the alley, and after he had gone half-way up the block, the girl came to the end of the alley and screamed and went back into the alley. Gosa then continued to walk back to the base and was picked up by civil au-

thorities. There is no question that he had sexual intercourse with the girl who did not protest his advances. Miss Borden was the girl that the accused had seen at the earlier incident downtown. Gosa did not drag her back and did not undress her. The girl undressed herself. She did tell him about the pins but that was because she had dropped one. At no time did the girl set up any kind of protest while they were going to the place where the sexual intercourse occurred. Prior to entering the alley they had walked approximately three blocks and were talking all the time. The accused averred that the girl did not scream until after the act of sexual intercourse had taken place and he had departed. The accused did not observe any police cars or policemen until he reached the gate at the base and it took him approximately 20 to 25 minutes to get there (R. 142-144).

2. OPINION.

a. The court was legally constituted throughout the trial and had jurisdiction over the offense and the person tried.

b. The accused had the requisite mental capacity at the time of trial and the requisite mental responsibility at the time of the commission of the offense (MCM, 1951, ¶ 138a).

c. The law officer correctly and adequately instructed the court in substantial compliance with Article 51c, Uniform Code of Military Justice (R. 193-200). Included in those instructions is the following: "There is evidence of some prior out of court statements by the accused which are inconsistent with his testimony by the court. These prior statements made by the accused are admissible in evidence only for the limited purpose of impeaching his credibility. The court is therefore instructed that these prior statements may be considered by the court only in determining the credibility of the accused as a witness. The court may not consider these prior statements, or any part of them, for the purpose of establishing the truth of the inconsistent matters as-

serted therein." This broad statement could be interpreted to include the accused's out of court statement given to the OSI agents which amounted to a confession. The instruction was certainly not prejudicial to the accused.

d. By his plea of not guilty to the charge and specification, the accused placed upon the Government the burden of proving beyond a reasonable doubt each element of the offense alleged. The elements of the alleged offense are:

(1) that, at Cheyenne, Wyoming, on or about 13 August 1966, the accused committed an act of sexual intercourse with Shirley Ann Borden;

(2) that Shirley Ann Borden was not the accused's wife; and

(3) that the act was done by force and without her consent.

The testimony of the victim in this case, which in my opinion was not self-contradictory, uncertain, or improbable, reflects that on the evening of 13 August 1966, as she was walking down the street she was overtaken by an individual and subsequently dragged or carried down an alley, choked and threatened after she had screamed. The incident ended in an act of sexual intercourse against which she did not struggle because she was in fear of her life. The accused has admitted that he was the individual that had sexual intercourse at that time and place with the victim; however, his contention that the act was voluntary on the part of the victim and that she did not scream until after the act had taken place, is not substantiated by other evidence of record. People living in the neighborhood heard the screaming and subsequently saw a person wearing pants apparently carrying another person down the alley. The police were called and arrived on the scene in approximately ten minutes, the length of time both the accused and the victim indicated that they were together.

At no time during the trial was any direct evidence presented that Miss Borden and Airman Gosa were not married to each other. However, it did appear Miss

Borden had never seen the accused prior to the night of 13 August 1966 (R. 33). Further, both counsel constantly referred to her as Miss Borden and the fact that the accused and the victim had different surnames necessarily implies that the victim was not the wife of the accused (United States v. Voudren, 33 CMR 722, pet. den., 33 CMR 436; United States v. Childers, 31 CMR 747, pet. den., 32 CMR 472).

The foregoing together with the justifiable inferences that can be drawn therefrom appears to my mind convincing beyond a reasonable doubt as to the accused's guilt of the offense alleged. You, too, must be convinced beyond a reasonable doubt of the accused's guilt before approving the findings of guilty.

e. The sentence is within the power of the court to adjudge, is within the prescribed limitations on punishment and is in proper form (R. 211; App. Ex. 3).

f. There are no errors or irregularities reflected in the record of trial materially prejudicial to any substantial rights of the accused within the meaning of Article 59, Uniform Code of Military Justice. However, the following matters merit comment:

(1) During the pre-arraignment proceedings, assistant trial counsel inquired as to the qualifications of individual counsel pursuant to Article 27b. Defense counsel's reply was "Individual counsel, by virtue of his admission to the Bar of Maryland, is qualified." Article 27b, UCMJ, of course, discusses certification of judge advocates rather than qualification, and counsel merely by being a member of the bar of the highest court of any state is not certified in accordance with Article 27b. Such certification is granted only by The Judge Advocate General.

(2) The president of the court was furnished Appellate Exhibit 1 to use in swearing in the counsel. It is noted that in the oath given individual counsel, Lieutenant Tulley, that he was referred to as the assistant defense counsel. The orders appointing the court, of course, reflect that there was no assistant defense counsel and the record further reflects that Lieutenant Tulley was the individual defense counsel. However, the refer-

ence to assistant defense counsel is of no great moment as the oath taken by all counsel is the same with the exception of the duties to be performed. Duties of defense counsel, assistant defense counsel, and individual counsel are much the same. I would like to commend the practice of having the law officer administer the oaths to counsel in a general court-martial.

(3) Both in an out of court hearing and in open court Gosa averred that he told Sergeant Dougherty, the NCOIC of the Confinement Section, that if the OSI kept questioning him the way they were that he was going to admit that he was guilty as he was tired of the questioning. Gosa admitted that he had been advised he could take a break at any time and he did not request one. Gosa further claimed that he was advised by the investigators that if he would cooperate with them, they would help him and would see that instead of being tried, he would be sent to the Fitzsimons General Hospital for treatment. The allegations of Gosa relative to these matters were denied by both OSI agents, both testifying that at no time did they give any indication that things would go easy on the accused if he confessed, nor did they tell him he wouldn't have a chance if the case went to trial. Further, no statements to the effect that they would help him be sent to Fitzsimons General Hospital in lieu of court-martial were made. The accused's interrogation began at approximately 0830 in the morning and lasted until 111 when the parties went to lunch. The interrogation resumed about 1315 and was concluded at approximately 1800 hours. The issues raised by the accused were considered by the law officer who overruled defense's objection to the introduction of the accused's out of court oral statement to the OSI agents and the question was presented to the court with appropriate instructions.

(4) The law officer approached dangerous grounds when questioning the accused on the voluntariness of his statement when he asked the following question: "Airman Gosa, did I understand you correctly—you said a minute ago and I understood, you admitted you made these admissions only because of the questioning that

you were being subjected to and not because these statements of admission were true?" (R. 111). Had the last clause not been included, comment relative to the question would not be necessary. However, taking the question as a whole it cannot be interpreted as seeking an answer from the accused as to whether the statement he gave the OSI agents was true or false.

(5) Many pen and ink corrections have been made in the record of trial by those responsible for preparing and authenticating it and many more could have been made. Two rather noticeable uncorrected errors are as follows:

"LO: We will call this out of court session into hearing and session" (R. 177) and "(Court recessed at 1545 hours, 1 December 1966 and reconvened at 1415 hours, 1 December 1966)" (R. 135). Checking the record it is obvious that the court reconvened at 1615 hours.

3. POST TRIAL ALLEGATIONS.

Subsequent to the trial, the accused submitted for consideration by reviewing and appellate authorities, several matters which his counsel referred to as "complaints and requests". These matters are as follows:

a. The accused alleged that the staff judge advocate to the officer exercising special court-martial jurisdiction (Major Samuel R. Richman) talked with two members of the court during recesses at trial. The first occasion was when the president of the court entered Major Richman's office and remained approximately five minutes. Affidavits obtained from Colonel Child and Major Richman indicate that during the first day of trial when it appeared that counsel for both sides were not ready to reconvene following a recess, Colonel Child stopped by the doorway to Major Richman's office and inquired as to the reason for the delay and the probable extent of it. He was advised that counsel were interviewing a witness and the court would resume as soon as possible. The accused further averred that immediately after the first day of trial the president, Colonel Child and a court member, Captain Charles M. Copple, gathered in Major

Richman's office for at least twenty minutes with Major Richman. Major Richman's affidavit indicates that at the conclusion of the first day of trial, he departed the building with Lieutenant Colonel Williams, the Law Officer, and proceeded directly to the Officers' Club for dinner. Colonel Child in his affidavit indicates that at the conclusion of the first day of trial, he proceeded to the main portion of the legal office, retrieved his hat and coat and departed. An affidavit obtained from Captain Copple reflects that after he left the court room, he went directly to the coat rack, got his hat and coat and went directly out of the building to his home. Lieutenant Colonel Williams states in his affidavit that at the conclusion of the first day of trial, he was introduced to Major Richman's wife and they proceeded directly to the club at the court's adjournment. Affidavits from 1st Lieutenant William D. Watson, the trial counsel, and 1st Lieutenant Lyman L. Frick, the assistant trial counsel, substantiate the information furnished by Colonel Child and Major Richman. That portion of the accused's complaint has no merit.

b. The accused further alleged that approximately one week before trial, he overheard Major Richman direct Sergeant Cole, the NCOIC, to call Mrs. Bentley at a certain number, and if she couldn't be reached, to then try another number at a school. Gosa saw Sergeant Cole dial a number and reach Mrs. Bentley at which time he (Gosa) was escorted from the office by an air policeman. On the afternoon of the first day of trial, Gosa observed Mrs. Bentley talking with Major Richman in his office. They were later joined by trial counsel and assistant trial counsel. Subsequently Gosa's counsel were advised that Mrs. Bentley had been called as a witness for the Government. From the above the accused concluded that Major Richman "acted as prosecutor in seeking and talking with a surprise witness". Mrs. Bentley had not appeared as a witness at the Article 32 investigation. Gosa further alleged that Major Richman had acted beyond the scope of his position and violated Article 6c of the UCMJ. Major Richman's affidavit reflects that Mrs. Bentley had previously indicated a preference not to ap-

pear and testify at the trial and his efforts to contact her prior to trial were with a view to offering her voluntary appearance rather than necessitating being subpoenaed. Affidavits from the trial counsel and assistant trial counsel reflect that when Mrs. Bentley was being interviewed relative to her testimony, they were the only ones present—and Major Richman had merely introduced Mrs. Bentley to them. Article 6c of the UCMJ prohibits anyone who has acted as a member, law officer, trial counsel, assisting trial counsel, defense counsel, assistant defense counsel, and investigating officer in any case to subsequently act as a staff judge advocate or legal officer to any reviewing authority on the same case. The reviewing authority in this case is, of course, the officer exercising general court martial jurisdiction and Major Richman in no wise has acted as a staff judge advocate or legal officer to that officer.

c. The accused further claims that for the above stated reasons Major Richman's clemency report should not be considered by higher authorities because of "obvious bias which was demonstrated by him during trial". There is nothing in the record and the accused has not presented any information, which warrants a conclusion, or even a suspicion, that Major Richman acted in any manner not consistent with the duties and responsibilities imposed upon a staff judge advocate to a special court-martial convening authority. His position in the case is set forth in his clemency report and in considering his evaluations and recommendations, you should at all times bear in mind his previous participation in this case.

d. I fail to find any prejudice to the accused in any of the matters submitted.

4. CLEMENCY CONSIDERATIONS.

a. The prosecution presented no evidence of previous convictions.

b. Summary of mitigation and extenuation evidence given at trial.

In his capacity as administrative supervisor at the base confinement facility, Sergeant Dougherty has had

an opportunity to observe the accused's conduct for some two and a half months. Airman Gosa was very courteous toward supervisory personnel and has not given confinement personnel any trouble at all. His attitude was considered to be above average for a prisoner.

Defense counsel made an unsworn statement on behalf of the accused in which he indicated that Gosa was quite new in the Air Force and had only been at Francis E. Warren Air Force Base since July 1966. Counsel further stated that Gosa's father was a farmer and that the accused has two sisters and three brothers in the family. The accused completed high school and while in high school participated in track and football. The Gosa family is a church-going family all belonging to the Baptist Church. The accused's mother suffers from ulcers and his father who has had several heart attacks has not been able to work on the farm lately. The accused was employed on the farm with his father during school and he also worked at a race track as a "valet". The accused has not advised his parents of his difficulty because of their health. Gosa hopes to qualify for the GI bill and go on to school studying math with the idea of teaching.

c. The clemency report attached hereto for your consideration was prepared by Lieutenant Colonel (then Major) S. R. Richman, Staff Judge Advocate of Francis E. Warren Air Force Base, Wyoming. Lieutenant Colonel Richman has previously acted in the capacity of staff judge advocate to the officer exercising special court-martial jurisdiction. The clemency report includes Lieutenant Colonel Richman's report of his personal interview with the accused, his evaluations and recommendations as well as those of the accused's commander, the base chaplain, the accused's first sergeant, his immediate supervisor, and the confinement officer. A copy of the clemency report was served on the accused and he was advised that he could submit matters in denial, rebuttal, or explanation of any of its contents. The accused acknowledged receipt of the report and took exception to numerous conclusions expressed therein. A copy of the

clemency report, and accused's acknowledgment of receipt of a copy thereof, and the reply of the accused to the report, are attached hereto, made a part hereof and incorporated herein.

d. At the time of the commission of the offense, the accused was eighteen years old and had less than three months active duty. His military career was of such short duration that it can add nothing to a determination as to the sentence which should be approved. Among those submitting clemency reports, only the chaplain has recommended that the sentence not be approved as adjudged. He recommends that the period of confinement be reduced and that Gosa be given "intensive psychiatric counseling". The offense of which the accused stands convicted has been termed "a most detestable crime". It does not appear that the accused as yet understands the seriousness of his actions. This perhaps is understandable based on his previous uninhibited sexual freedom. (The accused admits to siring three illegitimate children by three different females prior to his entry into the service. In view of the maximum punishment that could have been imposed upon the accused, I feel that the court was extremely lenient in adjudging the sentence in this case. Accordingly I recommend that the sentence as adjudged by the court be approved. The United States Disciplinary Barracks, Fort Leavenworth, Kansas, should be designated as the place of confinement pending completion of appellate review.

/s/ Oscar H. Emery, Jr.
 OSCAR H. EMERY, JR., Lt. Colonel, USAF
 Assistant Staff Judge Advocate
 Staff Judge Advocate

RECOMMENDATIONS OF THE STAFF JUDGE ADVOCATE

1. I have read the record of trial and I concur in the foregoing review.
2. The foregoing review constitutes the reviewer's and my summary of the evidence, opinion as to the adequacy

and weight of the evidence, effect of any error or irregularity respecting the proceedings, and recommendations as to the action to be taken with respect to the findings and sentence. As the convening authority in this case, you are empowered to weigh the evidence, judge the credibility of witnesses and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses. Before approving a finding of guilty, you must determine that such finding is established to your satisfaction beyond a reasonable doubt by competent evidence of record. I, like the reviewer, am convinced that the accused's guilt as to the offense of which he stands convicted, has been so established. In acting on the findings and sentence, you are empowered to approve only such findings of guilty and the sentence or such part or amount of the sentence as you find correct in law and fact, and as you in your discretion determine should be approved. Your exercise of discretion in determining what sentence to approve includes the power of commutation (the changing of a punishment to a less severe one of a different nature), as well as the powers of mitigation, suspension, and remission.

3. I recommend that the sentence be approved. The appropriate place of confinement, pending completion of appellate review, is the United States Disciplinary Barracks, Fort Leavenworth, Kansas.

4. A form of action which will accomplish the above recommendations is attached for your signature.

/s/ Harold R. Vague, Colonel, USAF
Staff Judge Advocate

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS FIFTEENTH AIR FORCE

March Air Force Base, California 92508

GENERAL COURT-MARTIAL ORDER
NUMBER 14

11 March 1967

Before a general court-martial which convened at Francis E. Warren Air Force Base, Wyoming, pursuant to Special Order C-49, Headquarters Fifteenth Air Force, 2 November 1966, was arraigned and tried:

AIRMAN THIRD CLASS JAMES R. GOSA, AF1495-9979, United States Air Force, 809th Combat Defense Squadron.

Charge: Violation of the Uniform Code of Military Justice, Article 120

Specification In that AIRMAN THIRD CLASS JAMES R. GOSA, United States Air Force, 809th Combat Defense Squadron, Francis E. Warren Air Force Base, Wyoming, did, at Cheyenne, Wyoming, on or about 13 August 1966, rape Shirley Ann Borden.

PLEAS: To the specification and charge, not guilty.

FINDINGS: Of the specification and charge, guilty.

SENTENCE: To be discharged from the service with a Bad Conduct Discharge, forfeit all pay and allowances, to be confined at hard labor for 10 years and to be reduced to the grade of Airman Basic. (No previous convictions considered).

DATE ADJUDGED: The sentence was adjudged on 2 December 1966.

ACTION BY THE CONVENING AUTHORITY:

DEPARTMENT OF THE AIR FORCE, HEADQUARTERS FIFTEENTH AIR FORCE, March Air Force Base, California, 11 MAR 1967

In the foregoing case of AIRMAN THIRD CLASS JAMES R. GOSA, AF14959979, United States Air Force, 809th Combat Defense Squadron, the sentence is approved. The forfeitures shall apply to pay and allowances becoming due on and after the date of this action. The record of trial is forwarded to The Judge Advocate General of the United States Air Force for review by a board of review. Pending completion of appellate review the accused will be confined in the United States Disciplinary Barracks, Fort Leavenworth, Kansas.

DEPARTMENT OF THE AIR FORCE
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D. C.

In the Board of Review, United States Air Force
Before CORRIGAN, Chairman, BOUCHER and
TORVESTAD, Members Judge Advocates

AFJAMA-2

ACM 19784

26 May 1967

UNITED STATES

v

Airman Third Class JAMES R. GOSA, AF14959979,
809th Combat Defense Squadron

FIFTEENTH AIR FORCE (SAC)

Sentence adjudged 2 December 1966 by GCM convened at Francis E. Warren Air Force Base, Wyoming. Approved sentence: Bad conduct discharge, total forfeitures, confinement at hard labor for ten (10) years, and reduction to airman basic.

Appearances:

Colonel Joseph Buchta and Lieutenant Colonel Milton E. Kosa, appellate counsel for the accused; Colonel James R. Thorn, appellate counsel for the United States.

DECISION

In the above-entitled case, the Board of Review, having found the approved findings of guilty and sentence correct in law and fact, and having determined on the basis of the entire record that they should be approved, hereby affirms the same.

[Absent]
JOSEPH F. CORRIGAN

/s/ Ernest Boucher
ERNEST BOUCHER

/s/ Robert J. Torvestad
ROBERT J. TORVESTAD

UNITED STATES COURT OF MILITARY APPEALS

No. 20,304

UNITED STATES, APPELLEE

v.

Airman Third Class JAMES R. GOSA (AF 14959979),
APPELLANT

ORDER DENYING PETITION FOR REVIEW

On consideration of the Petition for Grant of Review of the decision of the Board of Review in case No. ACM 19784 of the United States Air Force, it is, by the Court, this 16th day of August, 1967,

ORDERED:

That said Petition be, and the same is, hereby denied.

For the Court

/s/ Frederick R. Hanlon
FREDERICK R. HANLON
Acting Clerk

JAMES R. GOSA, former Airman Third Class,
U. S. Air Force, PETITIONER

v

UNITED STATES, RESPONDENT
19 USCMA 327, 41 CMR 327

Courts-martial § 43—application of Supreme Court decision setting forth limitations on court-martial jurisdiction.

The limitations on court-martial jurisdiction set forth in *O'Callahan v Parker*, 395 US 258, 23 L Ed 2d 291, 89 S Ct 1683, do not apply to cases that had become final before the date of that decision.

Miscellaneous Docket No. 69-64
March 20, 1970

On petition for Reconsideration.¹ Petition denied.

Colonel Bertram Jacobson and *Major Frank T. Moniz* were on the pleadings for Petitioner.

Colonel James M. Bumgarner and *Major Robert L. Bates* were on the pleadings for Respondent.

OPINION OF THE COURT

DARDEN, Judge:

In December 1966 a general court-martial² at Francis E. Warren Air Force Base, Wyoming, convicted the petitioner of raping a civilian off military property in Cheyenne, Wyoming, and sentenced him to a bad-conduct discharge, total forfeitures, confinement at hard labor for ten years, and reduction to the lowest pay grade. This

¹ The application is actually titled "Motion to Vacated [sic], Sentence and Conviction, with all deprived right and privileges restored." In substance, however, it amounts to a petition for reconsideration.

² ACM 19784.

Court denied his petition for grant of review in August 1967. He now is serving his sentence at the Federal Correctional Institution, Tallahassee, Florida.

The petitioner filed with this Court a motion to vacate sentence as a result of a decision by the Supreme Court of the United States in *O'Callahan v Parker*, 395 US 258, 23 L Ed 2d 291, 89 S Ct 1683 (1969), and the decision of this Court in *United States v Borys*, 18 USCMA 547, 40 CMR 259 (1969), applying the *O'Callahan* principle to a case that was still subject to direct review before the date of the *O'Callahan* opinion. He also petitioned for a writ of habeas corpus in the United States District Court for the Northern District of Florida. That petition was denied in *Gosa v Mayden*, 305 F Supp 1186 (1969), an opinion referred to in the decision of this Court in *Mercer v Dillon*, 19 USCMA 264, 41 CMR 264 (1970), in which we held that the *O'Callahan* principle does not apply to cases that had become final under Article 76 of the Uniform Code of Military Justice, 10 USC § 876, before the date of the *O'Callahan* opinion.

For the reasons outlined in *Mercer* the petition is denied.

Chief Judge QUINN concurs.

FERGUSON, Judge (dissenting):

I dissent.

In this petition, as in *Mercer v Dillon*, 19 USCMA 264, 41 CMR 264 (1970), the question now before us revolves about the prospective or retrospective application of the Supreme Court's decision in *O'Callahan v Parker*, 395 US 258, 23 L Ed 2d 291, 89 S Ct 1683 (1969), that a court-martial is without jurisdiction to proceed unless the charged offense is "service-connected." The majority of this Court have denied the accused's petition for extraordinary relief, in accordance with their

holding in *Mercer* that the principle of the *O'Callahan* opinion applies only to those cases still subject to review by this Court on the date of the *O'Callahan* opinion.

I have no alternative but to record my disagreement with their holding in this case for the same reasons as set forth in my dissent in *Mercer v Dillon*, *supra*.

Since I believe that the court-martial lacked jurisdiction over the charged offenses (*O'Callahan v Parker*, *supra*; *United States v Borys*, 18 USCMA 547, 40 CMR 259 (1969)), I would grant the petition, set aside the findings and sentence, and order the charges dismissed.

JAMES ROY GOSA, PETITIONER

v.

J. A. MAYDEN, Federal Correctional Institution,
Tallahassee, Florida, RESPONDENT

TCA 1519

UNITED STATES DISTRICT COURT
N. D. FLORIDA
TALLAHASSEE DIVISION

Nov. 13, 1969

Proceedings on petition for writ of habeas corpus by serviceman who was confined as result of court-martial. The District Court, Arnow, Chief Judge, held that Supreme Court decision that military men who commit non-service-connected crimes are entitled to indictment by grand jury and trial by a petit jury in a civilian court does not apply retroactively.

Writ denied.

Armed Services
Courts←100(1)

Supreme Court decision that military men who commit nonservice-connected crimes are entitled to indictment by grand jury and trial by a petit jury in a civilian court does not apply retroactively.

James Roy Gosa, in pro. per.

Clinton Ashmore, Asst. U. S. Atty., Northern District of Florida, Tallahassee, Fla., for respondent.

ORDER

ARNOW, Chief judge.

This cause is before this Court on petition for writ of habeas corpus. Petitioner is presently confined at the

Federal Correctional Institution, Tallahassee, Florida, as the result of a military court-martial on December 2, 1966. Petitioner alleges that he was convicted by military court-martial for a nonservice connected offense, and argues that the recent Supreme Court case of *O'Callahan v. Parker*, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969), should be applied retroactively to his case. The United States Attorney has responded to the Court's order to show cause by first denying that the rule of *O'Callahan* is applicable to the facts of this case, and then by arguing that even if applicable, *O'Callahan* should be applied prospectively, rather than retroactively.

From a reading of the record presented in this case, it is obvious that Petitioner was convicted by military court-martial for a crime which was non-service connected as defined by *O'Callahan*. Petitioner was convicted of rape, which occurred while he was off base, off duty, dressed in civilian attire, and with the woman involved being a civilian. The sole but important question remaining for this Court to consider is that of the retroactive application of *O'Callahan*.

The majority of the court in the *O'Callahan* case held that a member of the Armed Forces who is charged with commission of a crime cognizable in a civilian court and having no military significance or connection is entitled to his constitutional rights of indictment by a grand jury and trial by a petit jury in a civilian court, and that a court-martial proceeding has no jurisdiction over such crimes. In spite of the fact that the Supreme Court, in *O'Callahan*, talks in terms of a lack of jurisdiction on the part of military courts martial, this Court is of the opinion that the basic rules laid down in *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453 (1966), *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967), and *DeStefano v. Woods*, 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d 1308 (1968), should apply to this case.

As previously pointed out, inherent in the *O'Callahan* decision is the constitutional right to trial by jury. In

an analogous situation, the Supreme Court, in *DeStefano v. Woods*, supra, held that the jury trial requirements imposed upon the states by *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), and *Bloom v. Illinois*, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968), should be applied prospectively rather than retroactively. In considering whether *O'Callahan* should be applied retroactively the following considerations laid out in *Stovall v. Denno*, 388 U.S. 297, 87 S.Ct. 1967 (1967), should be examined:

- a) The purpose to be served by the new standard;
- b) The extent of the reliance by law enforcement authorities on the old standards; and
- c) The effect on the administration of justice of a retroactive application of the new standard.

The Court, in the *O'Callahan* case, went to great lengths to contrast the court-martial procedure with that of trial by a jury of one's peers. *O'Callahan* holds that military men who commit non-service connected crimes are entitled to indictment by a grand jury and trial by a jury, because our civilian court system is better able to protect the constitutional rights of defendants. This Court does not understand, or construe, *O'Callahan* as inferring or holding that all past military courts-martial must be labeled unfair and viewed as being infected with the danger of having convicted the innocent. The values implemented by the right to indictment by a grand jury and the right to a jury trial would not measurably be served by requiring retrial of all persons convicted in the past by a court-martial proceeding. Moreover, both the military and civilian authorities have relied on the previously unquestioned constitutionality of those provisions of the Uniform Code of Military Justice, enacted by Congress, that provided for military jurisdiction over non-service connected crimes committed by servicemen. As pointed out by Justice Harlan in a dissenting opinion in the *O'Callahan* case, the military was justified in believing they had jurisdiction over these non-service connected crimes. Finally, the effect of a holding of general

retroactivity on law enforcement and the administration of justice would be significant, because the military court-martial has been used extensively in this country for years. A figure supplied by the United States Attorney, in his response to this Court's order to show cause, estimates that there have been in excess of 4,000,000 court-martial convictions since 1917.

For these reasons, this Court holds that *O'Callahan v. Parker* does, not apply retroactively.

Therefore, it is

Ordered: Petition for writ of habeas corpus is hereby denied.

IN THE
United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 29139

JAMES ROY GOSA,
Petitioner-Appellant,
versus

J. A. MAYDEN, WARDEN
Federal Correctional Institution
Tallahassee, Florida,
Respondent-Appellee.

*Appeal from the United States District Court for the
Northern District of Florida*

(October 12, 1971)

Before GODBOLD, SIMPSON and CLARK,
Circuit Judges.

CLARK, Circuit Judge: The sole, inexorable issue presented by this appeal requires us to predict whether the Supreme Court of the United States will apply its decision in *O'Callahan v. Parker*, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969), to comparable proceedings of military courts which reached a stage of complete finality prior to June 2, 1969, the date that decision

was announced. The court below reasoned that *O'Callahan* should be denied retroactive application. We affirm.

It all started for James Roy Gosa on August 13, 1966. He was then serving as a member of the United States Air Force stationed at Warren Air Force Base in Wyoming, and on the night in question, he was officially off-duty and with permission of his superior officers had left the military post dressed in mufti. Around midnight Gosa allegedly raped a civilian in Cheyenne, Wyoming. The asserted victim was not on any type of military duty and had no direct or indirect relationship with the military establishment. Although Gosa was arrested by Cheyenne civilian authorities for prosecution in their courts, he was subsequently released from their detention when the complaining party failed to appear. He thereupon was immediately taken into military custody and was charged with violation of Article 120 of the Uniform Code of Military Justice (U.C.M.J.) 10 U.S.C.A. §§ 920, which provides that any person subject to the Code who commits an act of rape may be punished as a court-martial may direct. Pursuant to the provisions of subchapters IV and V, U.C.M.J. (10 U.S.C.A. §§ 816-829), a general court-martial was duly convened which tried petitioner and, on December 2, 1966, found him guilty as charged. All of the multiple review procedures provided by the U.C.M.J. were accorded.¹ On July 11, 1967 Gosa peti-

¹The convening authority referred the record to his Staff Judge Advocate for review as required by Article 61, U.C.M.J. (10 U.S.C.A. § 861). In what Gosa himself acknowledges was a comprehensive review of the record, the Staff Judge Advocate submitted his written opinion to the convening authority, that

tioned the Court of Military Appeals for a grant of review under Article 67, U.C.M.J. (10 U.S.C.A. § 867). All direct review procedures were exhausted and Gosa's conviction became final in law on August 16, 1967 when the Court of Military Appeals denied review.

On August 21, 1969, Gosa filed his application for a writ of habeas corpus in the court below and on the 6th of November, 1969, filed with the United States Court of Military Appeals a motion to vacate his sentence and conviction. Both the application and the motion were based upon assertions that Gosa's confinement was invalid in the light of the decision in *O'Callahan* that the general court-martial which tried him lacked jurisdiction. Both the application for habeas relief and the motion to vacate, which the Court of Military Appeals treated as a petition for reconsideration, were denied.²

O'CALLAHAN — COMPARISON AND ANALYSIS

The Supreme Court granted a petition for certiorari review of a Tenth Circuit case styled *Relford v. Com-*

the findings and sentence of the general court-martial were correct in law and in fact. Subsequently the convening authority approved the findings and sentence as required by Article 64, U.C.M.J. (10 U.S.C.A. § 864), and pursuant to Article 65, U.C.M.J. (10 U.S.C.A. § 865) the convening authority followed this final action by sending the entire record, his action and the opinion of his Staff Judge Advocate to the Judge Advocate General of the United States Air Force where it was reviewed by a Board of Review pursuant to Article 66, U.C.M.J. (10 U.S.C.A. § 866). This Board affirmed both the finding of guilt and the sentence.

²305 F.Supp. 1186 (N.D.Fla. 1969); 19 U.S.C.M.A. 327, 41 C.M.R. 327 (March 20, 1970)

mandant U.S. Disciplinary Barracks, Ft. Leavenworth, for the limited purpose of deciding the retroactivity and scope of *O'Callahan*. See 397 U.S. 934, 90 S.Ct. 958, 25 L.Ed.2d 529 (1970). However, when *Relford* came on to be heard on its merits the Court determined that because *Relford's* offense had been perpetrated within the geographical boundary of a military post, it had a service connection which *O'Callahan* lacked. Thus, a decision on retroactivity was deemed inappropriate. ____ U.S. ____, 91 S.Ct. 649, ____ L.Ed.2d ____ (1971). *Relford* enumerated 12 factors which, if present, deprive a military court-martial of jurisdiction to try a member of the Armed Forces otherwise under the jurisdiction of that court by the congressional mandate of Article 2, U.C.M.J. (10 U.S.C.A. § 802)³ Each of these factors is unquestionably present in *Gosa's* case; indeed the only distinction, locale — the Territory of Hawaii vis-a-vis the State of Wyoming — if effective at all, makes

-
31. The serviceman's proper absence from the base.
 2. The crime's commission away from the base.
 3. Its commission at a place not under military control.
 4. Its commission within our territorial limits and not in an occupied zone of a foreign country.
 5. Its commission in peacetime and its being unrelated to authority stemming from the war power.
 6. The absence of any connection between the defendant's military duties and the crime.
 7. The victim's not being engaged in the performance of any duty relating to the military.
 8. The presence and availability of a civilian court in which the case can be prosecuted.
 9. The absence of any flouting of military authority.
 10. The absence of any threat to a military post.
 11. The absence of any violation of military property.

One might add still another factor implicit in the others:

 - 12. The offense's being among those traditionally prosecuted in civilian courts.
- See also Articles 17 & 18, U.C.M.J. (10 U.S.C.A. §§ 817 & 818).

Gosa's case stronger. Indubitably, had *O'Callahan* been rendered prior to these events in Gosa's case, that decision would have deprived the general court-martial which tried Gosa of jurisdictional authority to hear or determine that cause.⁴ We cannot avoid deciding the scope of its applicability as precedent. We therefore must analyze it.

In *Relford*, the Court capsuled its prior holding in *O'Callahan* thus:

[B]y a five-to-three vote, the Court held that a court-martial may not try a member of our Armed Forces charged with attempted rape of a civilian, with housebreaking, and with assault with intent to rape, when the alleged offenses were committed off-post on American territory when the soldier was on leave and when the charges could have been prosecuted in a civilian court.

Looking in greater detail to the opinion itself, we first note that certiorari in *O'Callahan* was limited to the question:

⁴Not only did Gosa's alleged crime occur prior to *O'Callahan*, his conviction and sentence became final to the date of that decision; thus, there is no occasion for us to take any position on the issue of partial retroactivity accorded to the decision by the United States Court of Military Appeals which has, since the date of that decision, applied *O'Callahan* to void every court-martial action affecting a serviceman similarly situated whose conviction was still on direct review on June 2, 1969. *Mercer v. Dillon*, 19 U.S.C.M.A. 264, 41 C.M.R. 264 (March 6, 1970).

Does a court-Martial, held under the Articles of War, Tit. 10, U.S.C. § 801 *et seq.*, have jurisdiction to try a member of the Armed Forces who is charged with commission of a crime cognizable in a civilian court and having no military significance, alleged to have been committed off-post and while on leave, thus depriving him of his constitutional rights to indictment by a grand jury and trial by a petit jury in a civilian court? 393 U.S. 822, 89 S.Ct. 177, 21 L.Ed.2d 93.

After reciting the unlimited grant of congressional authority "To make Rules for the Government and Regulation of land and naval Forces" contained in Article I, Section 8, Clause 14 of the Constitution, and the Bill of Rights language which excepted only cases arising *in the land or naval forces*, and excepted those cases only from the Fifth Amendment's requirement of grand jury presentment or indictment, Mr. Justice Douglas, speaking for the majority, pointed out that Congress had developed a system of military justice with fundamental differences from civilian courts. He stated the issue in these words:

If the case does not arise 'in the land or naval forces,' then the accused gets *first*, the benefit of an indictment by a grand jury and *second*, a trial by jury before a civilian court as guaranteed by the Sixth Amendment and by Art. III, § 2, of the Constitution which provides: in part:

'The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial

shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.'

Those civil rights are the constitutional stakes in the present litigation. (395 U.S. 262) (Final sentence emphasis supplied.)

Then, after a discussion of pre and post-Constitution military court history, the conclusion of the decision was put in this language:

We have concluded that the crime, to be under military jurisdiction, must be service connected, lest 'cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger,' as used in the Fifth Amendment, be expanded to deprive every member of the armed services of the benefits of an indictment by a grand jury and a trial by a jury of his peers. (395 U.S. at 272)

Clearly then, grand and petit jury protections were the core rights sought to be vouchsafed. Since the opinion also spoke of other procedural aspects of the military system and compared some of these to civilian court processes, we cannot state with absolute assurance that the Court will later hold that only these two Bill of Rights protections were involved. However, this uncertainty is not critical to our conclusion.

Our analysis of *O'Callahan* must also center upon determining whether the Court decided that military tribunals lacked adjudicatory power over servicemen's offenses which were not "service-connected". Did the opinion hold that courts-martial lacked power over the subject matter and person of such a soldier because Congress had no constitutional authority to vest it, or did *O'Callahan* decide that the lack of grand and petit jury procedures (and perhaps other civilian court protections) resulted in the loss of jurisdiction otherwise within the control of congressional grant? In *Flemings v. Chafee*, ____ F.Supp. ____ (E.D.N.Y. 1971) [No. 70-C-1267, July 19, 1971], a most thorough and scholarly judicial determination, Judge Weinstein comes to the somewhat guarded conclusion that lack of adjudicatory power was the rationale of the decision. He also notes that other jurists have reached the opposite conclusion. See the decision here on appeal, *Gosa v. Mayden*, 305 F.Supp. 1186 (N.D. Fla. 1969); *Mercer v. Dillon*, 19 U.S.C.M.A. 264, 41 C.M.R. 264 (1970); *Schlomon v. Moseley*, ____ F.Supp. ____ (1971) [Civ. No. L-1003, May 19, 1971]; and the opinion of the Board of Review [Art. 66, U.C.M.J.] in *United States v. King*, ACM 20361 (July 30, 1969), review denied ____ U.S.C.M.A. ____, 40 C.M.R. 327 ().⁵

Despite the weight of authority to the contrary, we find the reasoning of *Flemings* persuasive on this issue. Read with an open mind, *O'Callahan's* foundation, framework and structure deny to the legislation which

⁵In what must be considered dicta since the serviceman did not come within *O'Callahan's* ambit, another district court also reasons against retroactivity without reaching this point. *Thompson v. Parker*, 308 F.Supp. 904 (M.D.Penn. 1970).

breathed the breath of judicial life into the forum that tried Sgt O'Callahan, the necessary basis in constitutional power to reach his type of case. It declares that because of the Bill of Rights, Article I, Section 8 cannot be read to enable Congress to authorize the military courts to try a peacetime soldier who, freed of military responsibility, albeit temporarily, is charged with a crime (a) cognizable in a civilian court and (b) having no military significance. It placed O'Callahan in the same status as a discharged serviceman,⁶ a civilian employed by the Armed Forces overseas,⁷ or a civilian accompanying the military service overseas.⁸ Although the language of the opinion does not say it in so many words, it holds that a member of the Armed Forces has an area of off-duty life wherein his general serviceman status is an insufficient nexus to bring his actions under the constitutional range of military "Government and Regulation".

RETROACTIVITY — NEED IT BE TESTED

The threshold problem we face in the instant appeal presents a completely novel issue, for *O'Callahan* did not overturn a prior precedent of the Court. It invalidated a part of a law made by Congress. We must determine whether the Supreme Court's doctrines of retroactivity are applicable to a decision which undoes

⁶*United States, ex rel Toth v. Quarles*, 350 U.S. 11, 76 S.Ct. 1, 100 L.Ed. 8 (1955).

⁷*McElroy v. Guagliardo*, 361 U.S. 281, 80 S.Ct. 305, 4 L.Ed.2d 282 (1960); *Grisham v. Hagan*, 361 U.S. 278, 80 S.Ct. 310, 4 L.Ed.2d 279 (1960).

⁸*Reid v. Covert*, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957); *Kinsella v. United States, ex rel Singleton*, 361 U.S. 234, 80 S.Ct. 297, 4 L.Ed.2d 268 (1960).

congressional action in a context where the Act involved has a half-century background of at least tacit judicial approval.

Of course it is illogical to assign shadings or degrees of nullity to acts which may be classed as void. But, with equal certitude, logic would assert that if a court decision reversing a prior judicial error of fundamental constitutional law must be tested for its retroactive impact, a court decision reversing a long established, judicially recognized legislative rule ought to be entitled to the same testing. For how could one assert that a proceeding which is invalid because it is in excess of constitutional right is less vacuous because its nullity results from judicial error rather than legislative action? Equally obviously, it is no more illogical to apply the rules for determining retroactivity to losses of liberty or property resulting from unconstitutional judicial precedent than to unconstitutional legislative action.

With these axioms in mind, we look to see how the doctrine of judicial determination of retroactivity came into existence. *Norton v. Shelby County, Tennessee*, 118 U.S. 425, 6 S.Ct. 1121, 30 L.Ed. 178 (1886), declared that an unconstitutional enactment conferred no right, imposed no duty, afforded no protection and was, in legal contemplation, as inoperative as though it had never been passed.* In *Chicot County Drainage Dist.*

*There is earlier, though non-judicial, precedent. In 1761, even before we had our present Constitution, the Colonial orator and patriot, James Otis, in his *Argument Against the Writs of Assistance*, stated: "An act against the Constitution is void; an act against natural equity is void." See also Nelson and Westbrook, *infra* n. 11.

v. Baxter State Bank, 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329 (1940), the Court retracted the broad statements of *Norton* and declared that those statements had to be taken with qualifications. It reasoned that the actual existence of a law prior to the determination of unconstitutionality is an operative fact and may have consequences which cannot justly be ignored. *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), the progenitor of the Court's precedents in this field, imported the rationale of *Chicot* into the criminal law. *Linkletter* is controlling precedent here for the assertion that there is no basis for distinction between legislation and judge-made law in reasoning retroactivity *vel non*.

Under our view set out above, *O'Callahan* presents another significant first in the field of retroactive adjudication because it involved a determination that the Constitution would not support a law which invested a judicial system with jurisdiction over the person and subject matter of the action tried. It has always been the law that proceedings of a court which is without jurisdiction of the subject matter are void, but does this inevitably lead to the necessity for full retrospective application of the court decision which first discovers and announces the jurisdictional deficit? We hold it does not.

Indeed, the question of jurisdiction lies at the second level in the analysis of the problem at hand. For though *O'Callahan* determines a lack of jurisdiction, the determination is the result of a new adjudication of constitutional right. Being taught as we will later show, that we can reject as inconsequential the specific pro-

vision of the Constitution on which a new precedent rests, as well as the relative value of the constitutional guarantee involved, we are impelled to the conclusion that this more than half-decade of precedent for selective retroactivity may not be ignored. In the light of this reasoning, no decision can arbitrarily be assigned full retroactivity solely on the basis that it operates on jurisdictional rather than proscribing the denial of a fundamental constitutional right that relates to another area of the processes of the criminal law.

Finally, one distinction remains to be made. The case at bar is not like *United States v. United States Coin & Currency*, — U.S. —, 91 S.Ct. 1041, — L.Ed.2d — (1971). There the Court prohibited a forfeiture of property which had its basis in the refusal of a citizen to incriminate himself, which is, of course, a form of conduct that could not have been constitutionally punished at any time from and after the date the Bill of Rights was adopted. Such right to refuse to incriminate oneself was not first confected in the decisions which declared that gambling registration forms would constitute self-incrimination and could not be required. Since there was no right to arrest the gambler who refused to file such forms, there was no right at all to seize his gambling equipment at the time of his illegal arrest. The opinion closes on this cogent note:

In the case before us, however, even the use of impeccable factfinding procedures could not legitimate a verdict decreeing forfeiture, for we have held that the conduct being penalized

is constitutionally immune from punishment.
(____ U.S. ____, 91 S.Ct. at 1046)¹⁰

It begs the question to assert that because the issue in *O'Callahan* is pure jurisdiction that *Coin & Currency* is analogous. No citizen can rightfully be jailed for exercising his religious freedoms or petitioning his government for a redress of grievances, even though some new litigation situation could conceivably arise in which such deprivations of liberty would be expressly voided. His right to be free of such restraints is clearly established in the Constitution itself and not in decisional precedent. This is just not at all the same as the new view of the right of Congress to regulate military jurisdiction over Sgt. *O'Callahan* which the Court announced on June 2, 1969. This latter decision is in the same category as *Bloom v. State of Illinois*, 391 U.S. 194, 488 S.Ct. 1477, 20 L.Ed.2d 522 (1968), or any other new or altered adjudication that changes fundamental rights of those accused of crime. One of the *O'Callahan-Relford* criteria, see note 3 *supra*, is that the crime involved must be cognizable in a civilian court. The crime of rape, for which *O'Callahan*, *Relford* and *Gosa* were prosecuted, was equally contrary to the laws of the civilian jurisdictions involved and the U.C.M.J. The issue for those cases and *Gosa's* as well is not whether the accused could be tried at all, but which forum had the right to conduct the proceedings. Not whether, but where.

¹⁰See also *Harrington v. United States*, ____ F.2d ____ (5th Cir. 1971) [No. 29481, July 14, 1971].

In sum, we hold that there is no arbitrary or simplistic basis for deciding retroactivity.¹¹ The heart of the doctrine is a reasoned application of new constitutional precedent. We must follow the course those decisions dictate in the case at bar.

RETROACTIVITY — GENERAL PRINCIPLES

The historical background against which the Supreme Court of the United States first explicated a set of rules to govern whether new court-enunciated constitutional principles of criminal law were to be invested with prospective, limited or fully retroactive application is detailed in Mr. Justice Clark's opinion in *Linkletter v. Walker*, *supra*. The intervening decisions which touched on this principle, as well as the comments of legal scholars who have explored the subject matter, have

¹¹We note that the opinions of commentators which have come to the attention of the *Flemings* court and to ours are in disagreement on this point. Nelson and Westbrook, *Court-Martial Jurisdiction Over Servicemen for "Civilian Offenses"*, an Analysis of *O'Callahan v. Parker*, 54 Minn. L.Rev. 1, 45; Note: *Court-Martial Jurisdiction Limited to "Service-Connected" Cases*, 44 Tulane L.Rev. 417; and Note: *Constitutional Law - Retroactivity - Should O'Callahan be Applied Retroactively?*, 2 Tex.Tech.L.Rev. 106; all three reason that the structure of the opinion in terms of jurisdictional deficit does not preclude testing the rule's application by the retroactivity standards applied to other new applications of constitutional fundamentals and that the statements critical of the fairness of military justice do not overcome the persuasiveness of the reliance and effect criteria of the Supreme Court's retroactivity rulings discussed *infra*. Whereas, Note: *Denial of Military Jurisdiction over Servicemen's Crimes Having No Military Significance and Cognizable in Civilian Courts*, 64 Nw. U.L.Rev. 930, and Note: *O'Callahan v. Parker, A Military Jurisdictional Dilemma*, 22 Baylor L.Rev. 64, make the ipse dixit assertion that the jurisdictional tenor of the opinion obviously requires retroactivity.

just been collated in Mr. Justice White's opinion in *Williams v. United States*, ____ U.S. ____, 91 S.Ct. 1148, ____ L.Ed.2d ____ (1971).¹² We need not attempt to duplicate this effort. However, the problem in this case is not discovering precedent but determining how it should be applied.¹³ We therefore deem more than bare citations necessary to develop the rationalization of our disposition of the vital and legally complex issue presented.

Linkletter denied full retroactive application to the rule of *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). *Mapp* changed prior decisional law by holding that the Fourteenth Amendment operated to require State courts to exclude evidence from criminal trials when it had been obtained in searches and seizures

¹²The only other Supreme Court cases which our research discloses have dealt with the issue, even tangentially, are *Fuller v. Alaska*, 393 U.S. 80, 89 S.Ct. 61, 21 L.Ed.2d 212 (1968), which refused retroactive application to *Lee v. Florida*, 392 U.S. 378, 88 S.Ct. 2096, 20 L.Ed. 1166 (1968), forbidding State use of evidence obtained in violation of the Federal Communications Act; *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), which gave retroactive application to *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), declaring the Fifth Amendment's double jeopardy protections applicable to State criminal procedures. [See *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970)]; *DeBaker v. Brainard*, 396 U.S. 28, 90 S.Ct. 163, 24 L.Ed.2d 148 (1969), which applied the non-retroactive holding of *DeSteffano v. Woods* to a minor who had been denied the right of trial by jury; and the other cases decided the same day *Williams* was handed down which are discussed *infra*.

¹³See Mr. Justice Harlan's dissenting opinion in *Williams*, *supra*, ____ U.S. at ____, 91 S.Ct. at 1171, ____ L.Ed.2d at ____ (1971) in which he observed: "... *Linkletter* became almost as difficult to follow as the tracks of a beast of prey in search of his intended victim."

which violated the Fourth Amendment. The majority opinion epitomized its holding thus:

[W]e believe that the Constitution neither prohibits nor requires retrospective effect. * * *

Rather than 'disparaging' the [Fourth] Amendment we but apply the wisdom of Justice Holmes that '[t]he life of the law has not been logic: it has been experience.' Holmes, *The Common Law* (Howe ed. 1963) * * *

In short, we must look to the purpose of the Mapp rule; the reliance placed on the Wolf doctrine; and the effect on the administration of justice of a retrospective application of Mapp. * * *

All that we decide today is that *though the error complained of might be fundamental* it is not of the nature requiring us to overturn all final convictions based upon it. (Emphasis supplied)

Tehan v. United States, ex rel. Shott, 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453 (1966), refused retroactivity to *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), which denied to the states that did not already proscribe it, the right to comment on the failure of the defendant to testify in a criminal proceeding. *Tehan* differentiated the self-incrimination protections of the Fifth Amendment from (i) the denial of the assistance of counsel, (ii) the burdening of the opportunity of indigents to appeal and (iii) the use of

coerced confessions, all of which had been given fully retroactive application, by pointing out that these latter three processes infected a criminal proceeding with "the clear danger of convicting the innocent." By contrast, it classed the privilege against self-incrimination not as an adjunct to the ascertainment of truth but as a protection of the right of an individual to be let alone. By application of the tripartite test of *Linkletter* — purpose, reliance and effect — the Court reasoned that a prospective application of *Griffin's* rule best served the interests of justice.

In a majority opinion by Chief Justice Warren, *Johnson v. State of New Jersey*, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966) refused retroactive effect to *Escobedo v. State of Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964) and *Miranda v. State of Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), which had defined and delineated the rights of those accused of crime during the arrest and investigatory period and had rendered inadmissible statements and confessions received when such accused were without counsel and had not been warned and advised of their rights. In the course of refining and applying *Linkletter*, *Johnson*¹⁴ stated:

We here stress that the choice between retroactivity and nonretroactivity in no way turns on the value of the constitutional guarantee involved. * * *

¹⁴Which viewed *Escobedo* and *Miranda* as containing Fifth rather than Sixth Amendment rights.

We also stress that the retroactivity or non-retroactivity of a rule is not automatically determined by the provisions of the Constitution on which the dictate is based. Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved. * * *

Finally, we emphasize that the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the factfinding process at trial is necessarily a matter of degree. * * *

We are thus concerned with a question of probabilities and must take account, among other factors, of the extent to which other safeguards are available to protect the integrity of the truth-determining process at trial. (384 U.S. at 728-729)¹⁵

Assuming that there were past injustices which could have been averted by having counsel present at the time, Mr. Justice Brennan, speaking for the Court in

¹⁵Three years later Mr. Justice Warren also delivered the opinion of the Court in *Jenkins v. Delaware*, 395 U.S. 213, 89 S.Ct. 1677, 23 L.Ed.2d 253 (1969), which denied the application of *Miranda* exclusion standards to evidence that had been secured prior to the date that decision was announced in retrials which occurred subsequent to the date of *Miranda*. This opinion places strong emphasis on the reliance criterion.

Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967), refused retroactive application to *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) and *Gilbert v. State of California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967), which had rendered inadmissible in State and Federal prosecutions pretrial identification procedures handled in the absence of counsel. It is this opinion which announced the most frequently quoted epitome for retroactivity determinations:

- (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards. (388 U.S. at 297)

Since most other cases declaring a constitutional right to counsel have been granted full retroactive effect and since *Stovall* speaks of the *Wade* and *Gilbert* rights as ones which prevent dangers and unfairness in the fact-determining process and enhance the integrity and reliability of trials, it is of considerable moment to the case at bar that *Stovall* expressly gave the reliance and effect factors overriding significance in restricting the effect of the decisions to *Wade* and *Gilbert* alone.

Even though it is a short per curiam with two justices concurring on different grounds and two dissenting, *DeSteffano v. Woods*, 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed. 2d 1308 (1968) is perhaps the most significant precedent to the case at bar. There, the Court refused retroactive

application to *Duncan v. State of Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), which held that States cannot deny a request for jury trial in serious criminal cases, and to *Bloom v. State of Illinois*, *supra*, which held that the right to jury trial extends to trials for serious criminal contempts. Based upon the (a)(b)(c) test that had been distilled from prior decisions in *Stovall*, the Court reasoned *Duncan* should not be applied retroactively because:

[I]n the context of the institutions and practices by which we adopt and apply our criminal laws, the right to jury trial *generally tends to prevent arbitrariness and repression*. As we stated in *Duncan*, 'We would not assert, however, that every criminal trial — or any particular trial — held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury.' (392 U.S. 633-634) (Emphasis supplied)

Of greater moment for Gosa's case was this application of retrospectivity standards to *Bloom*:

The considerations are somewhat more evenly balanced with regard to the rule announced in *Bloom v. State of Illinois*. *One ground for the Bloom result was the belief that contempt trials, which often occur before the very judge who was the object of the allegedly contemptuous behavior, would be more fairly tried if a jury determined guilt*. Unlike the judge, the jurors will not have witnessed or suffered the alleged contempt, nor suggested prosecu-

tion for it. However, the tradition of nonjury trials for contempts was more firmly established than the view that States could dispense with jury trial in normal criminal prosecutions, and reliance on the bases overturned by *Bloom v. State of Illinois* was therefore more justified. Also, the adverse effects on the administration of justice of invalidating all serious contempt convictions would likely be substantial. Thus, with regard to the *Bloom* decision, we also feel that retroactive application is not warranted. (392 U.S. at 634) (Emphasis supplied)

On April 5, 1971, in the combined cases of *Williams v. United States* and *Elkanich v. United States*, *supra*, the Court refused retroactive application to *Chimel v. The State of California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), which denied the states the right to admit certain evidence seized incident to an arrest. In a four-judge majority opinion announced by Mr. Justice White,¹⁶ the Court gave us this most current assay of how it applied the (a) part test of *Stovall*:

Since . . . [Linkletter], we have held to the course that there is no inflexible constitutional rule requiring in all circumstances either absolute retroactivity or complete prospectivity

¹⁶Justices Brennan and Marshall concurred in the denial of retroactivity in separate opinions. Mr. Justice Black concurred in the result, but on the ground that *Chimel* had been wrongly decided. Mr. Justice Harlan filed a lengthy and thought-provoking dissent in *Williams and Elkanich* and a doubtful concurrence in *Mackey*, *infra*.

for decisions construing the broad language of the Bill of Rights.

Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial which substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances.

It is quite different where the purpose of the new constitutional standard proscribing the use of certain evidence or a particular mode of trial is not to minimize or avoid arbitrary or unreliable results but to serve other ends. (____ U.S. ____ at ____, 91 S.Ct. at 1191-1193)

Two other opinions, rendered the same day as *Williams and Elkanich*, dealt with the application of *Marchetti v. United States*, 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889 (1968), and *Grosso v. United States*, 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 906 (1968), which prohibited the prosecution of gamblers who failed to register and pay a tax imposed by federal law on the grounds that the registration requirement violated Fifth Amendment privileges against self-incrimination. In *Mackey v. United States*, ____ U.S. ____, 91 S.Ct. 1160, ____ L.Ed.2d ____ (1971), four justices concluded that

Marchetti and *Grosso* should not be applied retroactively since there was no threat to the reliability of the fact-finding process involved in Mackey's trial for income tax evasion because of the evidentiary use of the *Marchetti-Grosso* proscribed wagering tax forms.¹⁷ *United States v. United States Coin & Currency*, *supra*, involved forfeiture of property because of a refusal to file a self-incriminating form. It has been discussed above.¹⁸

This full, but hopefully not fulsome, development of the elements which form today's doctrine for court control of the reach of precedential effect of new pronouncements of constitutional rights in the field of criminal law, sets the stage for testing *O'Callahan* for this case. The tests will be applied in the (a)(b)(c) formula format of *Stovall* with due regard for the explanations and emphasis supplied to each criterion by subsequent decisions.

¹⁷Again the Court was badly split in its reasoning. Considering that matters of procedure rather than substance were involved, Mr. Justice Harlan concurred. Justices Brennan and Marshall concluded that the bar of the Fifth Amendment did not extend to the enforcement of income tax laws applicable to those in the business of accepting wages, and that *Marchetti* and *Grosso* could be distinguished. Justices Black and Douglas dissented. See also *United States v. Scaglione*, ____ F.2d ____ 5th Cir. 1971) [No. 29279, July 9, 1971].

¹⁸On the same day, *Hill v. California*, ____ U.S. ____, 91 S. Ct. 1106, ____ L.Ed.2d ____ (1971), involving the retroactivity of *Chimel*, was decided. It was not expressly reasoned but merely relied on *Williams*, *supra*. That day also, the Court handed down *United States v. White*, ____ U.S. ____, 91 S.Ct. 1122, ____ L.Ed.2d ____ (1971), adhering to its decision of nonretroactivity announced in *Desist v. United States*, 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969). This case likewise did not contain an explication of principles.

RETROACTIVITY — APPLICATION OF THE TESTS

(A) Purpose of the New Standard.

The purpose of *O'Callahan* may be stated in two ways. Affirmatively, it secured the constitutional right of grand jury presentment or indictment and petit jury trial to servicemen on active duty who were accused of crimes having no service connection.¹⁹ Negatively phrased, *O'Callahan* denied military jurisdiction which exceeded the least possible power which the Constitution reposed in Congress and did so to avoid numerous incidents and functions of military justice considered less satisfactory to the determination of guilt than procedures available in civilian courts that would occupy the jurisdictional vacuum.

Under the affirmative statement of the test, *DeSteffano, supra*, particularly since it applies *Bloom* prospectively, predicts that the Supreme Court will hold *O'Callahan* should not be applied retroactively. In the words of the Court, the purposes of that decision were to require jury trials (a) in serious criminal cases because such jury trials generally tend "to prevent arbitrariness and repression" which even impartial judges might exhibit, and (b) in serious criminal contempt cases because juries could "more fairly" try alleged contemnors than could a judge who had been the object of the contemptuous act. The same purposes

¹⁹The record before us does not disclose and no claim is advanced that Gosa's military trial was held away from the vicinage of the crime or that he was in any way impeded in securing other constitutional protections. We, therefore, do not reach these issues which were discussed in *Flemings, supra*.

underlie *O'Callahan*, even given its stern view of the faults of military courts which we detail below.

Obviously the negative statement gives a much broader sweep to *O'Callahan* and requires an independent analysis of purpose in the light of the Court's prior inquiries into the reliability of guilt determination — the fairness of the trial — the very integrity of the fact-finding process.

Candor, rather than even a hint of disrespect, compels the observation here that this particular facet of testing for retroactivity deals almost entirely in subjective judge-conceived notions based in no part on tangible evidence developed by an adversary process or otherwise, but rather upon feelings and concepts which are the product of each individual jurist's experiences and readings. Thus, with no deepseated assurance that the question ought not be certified to the High Court,²⁰ we reason to the following conclusions.

No analysis of the wider purpose of *O'Callahan* would be correct that did not weigh the critical ingredient of reliability of the fact-finding processes which it altered. Likewise, no test of this factor would be objective which overlooked the critical, indeed deprecatory, terms which the majority opinion applied to the general system of military justice.

Quoting from *United States ex rel Toth v. Quarles*, 350 U.S. at 22-23, it states:

²⁰A procedure available under 28 U.S.C.A. § 1254(3) (1966).

There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution. Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.

Then Mr. Justice Douglas' own words proclaim:

A court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved. * * * . . . expansion of military discipline beyond its proper domain carries with it a threat to liberty. (395 U.S. at 265)

A court-martial is tried, not by a jury of the defendant's peers which must decide unanimously, but by a panel of officers empowered to act by a two-thirds vote. The presiding officer at a court-martial is not a judge whose objectivity and independence are protected by tenure and undiminishable salary and nurtured by the judicial tradition, but is a military law officer. Substantially different rules of evidence and procedure apply in military trials. Apart from those differences, the suggestion of the possibility of influence on the actions of the court-martial by the officer who convenes it, selects its members and the counsel on both sides, and who usually has direct command authority over its members is a pervasive one

in military law, despite strenuous efforts to eliminate the danger. (395 U.S. at 363-364)

While the Court of Military Appeals takes cognizance of some constitutional rights of the accused who are court-martialed, courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law. (395 U.S. at 265)

A civilian trial . . . is held in an atmosphere conducive to the protection of individual rights, while a military trial is marked by the age-old manifest destiny of retributive justice.²¹

As recently stated: 'None of the travesties of justice perpetrated under the UCMJ is really very surprising, for military law has always been and continues to be primarily an instrument of discipline, not justice.' Glasser, Justice and Captain Levy, 12 Columbia Forum 46, 49 (1969). (395 at 265)²¹

While commentators on both sides of the *O'Callahan* retroactivity issue have been critical of these statements,²² and other authorities have stated more favor-

²¹Footnote 7 in this quote refers to the entire system as one of "so-called military justice".

²²See e.g., Nelson and Westbrook, *supra*, n. 11, in favor of prospectivity, which states:

Considered as a whole, the majority opinion is persuasive only to those who were already persuaded. Faced with a problem involving many complex variables and requiring the delicate balancing of competing interests,

able conclusions about the fundamental fairness of the system,²³ we hasten to assert that, as an inferior tribunal, we have no prerogative and it is not our purpose to dispute any of O'Callahan's language in the slightest degree. Our direct quotations here are solely for the purpose of demonstrating that, demeaning of military justice as these remarks may be, the opinion does not formulate its new constitutional restriction on congressional power for the purpose of preventing or undoing the conviction of innocent men. There was no determination that the UCMJ carried a clear danger of convicting the innocent, nor was it adjudicated that Congress had ordained a truth-determining process which lacked integrity or which as infected with procedures which substantially impaired the truth-finding function.

Civilian court bias which might tend to protect local

the Court responds with dogmatic assertions about military justice. (55 Minn. L.Rev. 1, 63)

while the comment in Baylor L.Rev., *supra*, n. 1, which opts for retroactivity, observes:

Through a theme of the military as historical bandits of freedom for its members, the Court sets the tone for its construction.

(22 Baylor L.Rev. at 67)

²³See *Mercer v. Dillon*, *supra*; Chief Justice (then Judge) Burger dissenting in *United States ex rel Guagliardo & McElroy*, 259 F.2d 927, 940, referred to the USMJ as having received universal recognition as "affording the basic elements of fairness"; Chief Justice Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L.Rev. 181, 188-189; Quinn, *Some Comparisons Between Courts-Martial and Civilian Practice*, 15 U.C.L.A. L.Rev. 1240; Everett, *O'Callahan v. Parker*, *Milestone or Millstone in Military Justice*, Duke L.J. 853; see also Senator⁴ Ervin's anthology of significant instances in which courts-martial accorded procedural protections before civilian courts, 115 Cong.Rec. S 7174, 7175 (June 25, 1969).

citizens and their property from the troops was not put into the scales for comparison, nor was the worth of the military system tested at the general court-martial level where Gosa was tried. There the serviceman receives many procedural rights which are even more conducive to fact accuracy than most civilian forums accord.²⁴ The Court has told us that the extent to which other safeguards are available is also a pertinent consideration. As the history of Gosa's case amply demonstrates, general courts-martial receive several direct reviews of fact and law. The civilian staffed United States Court of Military Appeals, whose judges have fifteen-year tenure at a salary equal to our own, has both direct²⁵ and habeas review power.²⁶ Also, the federal courts have long been available for a collateral attack upon court-martial proceedings to secure basic constitutional guarantees and a full, fair hearing on all allegations raised.²⁷

We conclude that *O'Callahan* ultimately decides no more on this subject than that there is a belief that a civilian court trial with grand and petit jury protections would tend to prevent arbitrariness and repression and be fairer. This belief is insufficient under *DeSteffano* standards to warrant retroactivity if other criteria point strongly to prospective application. Indeed, if the military court system as a whole were pro-

²⁴See Quinn, 15 U.C.L.A. L.Rev. 1240, *supra*, n. 23 and Comment, 22 Baylor L.Rev. 64, *supra*, n. 11.

²⁵Art. 67 U.C.M.J. (10 U.S.C.A. § 867).

²⁶See *Levy v. Resor*, 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967).

²⁷*Burns v. Wilson*, 346 U.S. 137, 73 S.Ct. 1045, 97 L.Ed. 1508 (1953).

See also *Noyd v. Bond*, 395 U.S. 683, 89 S.Ct. 1876, 23 L.Ed.2d 631 (1969)

cedurally deficient, the attack and the holding in *O'Callahan* would certainly have condemned such lack of procedural and substantive due process equally with jurisdiction. Otherwise, the decision itself would stand as a denial of equal protection to those it left included in *O'Callahan* and, more importantly, in *Relford*. The latter case, according to its note 14 (91 S.Ct. at 658), extended the jurisdictional reach of military courts to about 80% of those servicemen who might otherwise have been excluded if a narrower definition of *O'Callahan* service connection had been adopted.

(B) *Justified Reliance on the Old Standard.*

We have been unable to find any authority or comment indicating that *O'Callahan* was foreshadowed in other opinions.²⁰ To the contrary, *Kinsella v. United States ex rel Singleton supra n. 9*, gave an interpretation to the power of Congress under the Constitution to constitute a system of military justice and to infuse it with jurisdiction which was clearly wide enough to encompass *O'Callahan*. The announcement there was:

The test for jurisdiction, it follows, is one of status, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval Forces'. (361 U.S. at 241)

No more need be said to demonstrate that this criterion clearly favors prospectivity.

²⁰Cf. *Roberts v. Russell*, 392 U.S. 293, 88 S.Ct. 1921, 20 L.Ed. 2d 1100 (1968).

(C) *Effect on the Administration of Justice of Retroactive Application.*

Here is another point that is free from doubt. If *O'Callahan* is held to be entitled to full retroactivity, the impact upon military justice, and upon the federal court system too, will be veritably staggering. In response to the request of this Court, the Department of the Air Force has advised that its court-martial systems have processed 475,349 cases since 1949 and although the sheer bulk of analysis prevented a case by case examination, a two-year sampling indicated to the Solicitor General of the United States that 5% would constitute a reasonable working hypothesis of the number of cases that could raise a retroactive *O'Callahan* issue. This calculates to be 23,767 trials in this branch of the service alone.²⁹ As the Court of Military Appeals has observed in *Mercer v. Dillon*, *supra*, peacetime court-martial jurisdiction over *O'Callahan*-type cases has been in existence since 1916. That opinion also pointed out that in the year 1968 there were 74,000 special and general courts-martial in the Army, the Navy and the Air Force. With a 55-year history, which includes several years in which the Armed Forces were swollen by the manpower demands of two major "world" wars, the total number of cases involved may reasonably be expected to number in the hundreds of thousands. Out of these possibilities, the numbers which could present issues still subject to review can only be rankly conjectured because of the variety of issues that could be raised. Again alluding to the language of *Mercer v. Dillon*:

²⁹Doubtless this has been somewhat restricted by *Relford*.

The range of relief could be extensive, involving such actions as determinations by the military departments of whether the character of discharges must be changed, and consideration of retroactive entitlement to pay; retired pay, pensions, compensation, and other veterans' benefits. Among the difficulties would be the necessity of reconstructing the pay grade that a member of the armed forces would have attained except for the sentence of the invalidated court-martial, a task complicated by the existence of a personnel system involving selection of only the best qualified eligibles and providing for the elimination of others after specified years of service.³⁰

Indeed, it seems to this Court that a major justification for resolving its acknowledged doubts as to the correctness of the decision in this case in favor of prospectivity is the tremendous effect which a holding of retroactivity could produce solely within this Circuit, and only within the brief interim between the time our decision was announced and the time the Supreme Court could finally determine the merits of the case. An erroneous determination of retrospectivity could inundate this already overloaded system and the mili-

³⁰That same court also observed:

In many of the courts-martial of earlier years, jurisdictional facts could have been developed on the record if there had been any reason to predict the need for doing so. The practical effect of voiding earlier convictions will often be to grant immunity from prosecution as a result of State statutes of limitations having run, witnesses having been scattered, and memories having been taxed beyond permissible limits.

tary forums with claims that would ultimately have to be reversed or dismissed. On the other side of the coin, if we err in holding for prospective application, while we acknowledge that we surely have added burdens to those wrongly imprisoned or deprived of their rights, the dimensions of the error would be infinitely less. The relative consequences to the administration of justice clearly indicate that we should pursue the more cautious course.³¹

CONCLUSION

We have set down in detail some will doubtless deem unnecessary the processes by which we have reasoned our decision. We have done so because the issue with which we have dealt is one of the greatest moment, involving as it does not only Gosa's freedom but potentially the freedom and property rights of many other citizens. If our reasoning is faulty, it is laid bare — its error will be plain. Using the best lights we are given, we believe it to be correct. We determine that the decision of the District Court that James Roy Gosa was not entitled to habeas corpus relief is correct and that decision is

AFFIRMED.

³¹Judge Godbold's dissent suggests a middle ground tactic which would opt for retroactivity, then stay our holding pending High Court review. Such a course would have little if any ameliorating effect upon the anticipated impact of such a circuit ruling on the district courts, who would bear the entire brunt anyway during the relatively brief period between our decision and the Supreme Court's ultimate determination.

GODBOLD, Circuit Judge, dissenting.

I believe that the present state of the authorities requires us to hold that *O'Callahan v. Parker*, 395 U.S. 258, 23 L.Ed. 2d 291 (1969) is retroactive. Predicting how the Supreme Court as final arbiter may decide that issue is a luxury not available to us as an intermediate appellate court. We apply the law as it comes to us.

I agree with the majority's interpretation of *O'Callahan*. Once it is concluded that the decision rested upon lack of jurisdiction by the court martial in the sense of lack of adjudicatory power, then the action of other courts martial which in like circumstances purported to exercise adjudicatory power that we now know Congress could not constitutionally give them cannot be validated by applying standards which, in other contexts, have been applied to selectively depart from the normal and traditional rule of retroactivity.¹

The "purpose-reliance-effect" test of *Stovall v. Denno*, 388 U.S. 293, 18 L.Ed. 2d 1199 (1967) is not a substantive end in itself but a tool of sorts for trying to find a way across areas not yet well charted. Judge Clark has spelled out some of the effects of retroactive appli-

¹The argument has been made that the question of prospective or retrospective application is not properly reached. See Judge Ferguson, dissenting in *Mercer v. Dillon*, 19 U.S.C.M.A. 264, 271, 41 C.M.R. 264, 271 (19):

"Where jurisdiction is lacking, there can be no question of prospective or retrospective application, for when a court-martial proceeds without jurisdiction, its action is null and void. *McClaghry v. Deming*, 186 U.S. 49, 46 L.Ed. 1049, 22 S. Ct. 786 (1902). See also *Ex parte Siebold*, 100 U.S. 371, 25 L.Ed. 717 (1880)."

cation of *O'Callahan*. They are so sweeping that all too easily the mind jumps to giving recognition to them by feeding them into a handy standard under which "effect" is a strong if not compelling factor. But the retroactivity cases since *Linkletter*^{1A} have viewed retroactivity versus prospectivity in the context of considering the effect of a newly articulated rule of constitutional law upon past actions taken by courts of general jurisdiction which had adjudicatory power. In that context, upon application of the new rule, one learned by hindsight that such courts had acted erroneously. *DiStefano v. Woods*, 392 U.S. 631, 20 L.Ed. 2d 1308 (1968), which gave only prospective effect to *Duncan v. Louisiana*, 391 U.S. 145, 20 L.Ed. 2d 491 (1968) (right to jury trial in all serious state criminal cases) and *Bloom v. Illinois*, 391 U.S. 194, 20 L.Ed. 2d 522 (1968) (right to jury trial in all state prosecutions for serious criminal contempts), is a case of that nature. None of the post-*Linkletter* cases has considered the question in the context of impact upon past actions taken by courts of special and limited jurisdiction, such as courts martial, where the effect of a choice of prospectivity will determine the adjudicatory power, in fact the very existence, of the court that has earlier acted.

A court martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished it is dissolved * * * To give ef-

^{1A}*Linkletter v. Walker*, 381 U.S. 618, 14 L.Ed. 2d 601 (1965).

fect to its sentences it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with, and that its sentence was conformable to law.

Runkle v. U.S., 122 U.S. 543, 555-56, 30 L.Ed. 1167, 1170 (1887).

A court-martial is wholly unlike the case of a permanent court created by constitution or by statute and presided over by one who had some color of authority although not in truth an officer *de jure*, and whose acts as a judge of such court may be valid where the public is concerned. The court exists even though the judge may be disqualified or not lawfully appointed or elected. But in this case the very power which appointed the members of and convened the court violated the statute in composing that court. It is one act, appointing the members of and convening the court, and in performing that act the officer plainly violated the law. Is such a court a valid court and the members thus detailed *de facto* officers of such valid court? Clearly not.

* * * *

By the violation of the law [in constituting its membership] the body lacked any statutory authority for its existence, and it lacked,

therefore, all jurisdiction over the defendant or the subject-matter of the charges against him.

* * * *

[T]his particular court was not legally constituted to perform the function for which alone it was convened. It was therefore in law no court.

McClaghry v. Deming, 186 U.S. 49, 64-65, 46 L.Ed. 1049, 1056 (1902).

Linkletter went to the power of the Supreme Court itself to make rulings with purely prospective effect, a power theretofore not clearly recognized though from time to time adverted to. Mishkin, *The High Court, The Great Court and the Due Process of Time and Law*, 79 Harv. L. Rev. 56-59 (1965). I do not doubt that this court too now has the same power. But the issue for us in this case is whether we will push outward the limits of this newly articulated judicial power into an area in which not only has the Supreme Court not recognized its applicability but also in which the concepts, considerations and consequences upon judicial institutions of application of the power are all very different. If *Linkletter* is to be so extended, and with such massive consequences² it should be by the Supreme Court

²Consequences are massive whether the decision is for retroactivity or prospectivity, and they do not become more or less so in either direction by mere characterization. My brothers point to the administrative and judicial problems which retroactivity would create. But prospectivity will leave in effect what all

itself and under standards promulgated by it.³ This conclusion is, I think, buttressed by the considerations set out by Justice Harlan concurring in *Mackey v. U.S.*, ____ U.S. ____, ____, 28 L.Ed. 2d 404, 410 (1971) and *Elkanich v. U.S.*, ____ U.S. ____, ____, 28 L.Ed. 2d 388, 410 (1971) and dissenting in *Williams v. U.S.*, *Id.*

Like my brethren, I am unsure of what the Supreme Court would decide, and I have attempted to avoid even a whisper of what I think the result should be. But I am firm in my view that at the Court of Appeals level we are not free in this case and at this time to selectively reject retroactivity. Therefore, I would reverse.

agree will be many thousands of convictions with all their attendant consequences. And prospectivity will becloud established rules of the effect of judgments of courts of limited and special jurisdiction acting outside their powers.

If our conclusion were in favor of retroactivity we could stay our decision pending Supreme Court review, which would avoid the purely interim problems. In any event, interim problems arising between the time of a decision by this court and a decision by the Supreme Court on the merits, are hardly a proper foundation for a particular merits decision by this court.

³My position is analogous to, but somewhat more firm than that of Judge Weinstein in *U.S. ex rel Flemings v. Chafee*, ____ F. Supp. ____, ____, [No. 70-C-1267 (E.D.N.Y., July 19, 1971)]:

"The mixture of theory and practical considerations in determining the extent to which new rules will be applied retroactively, particularly in this time of changing personnel and views on the Supreme Court, make reasonable predictions almost impossible. In such circumstances, bearing in mind that the traditional and standard rule is still one of retroactivity and that this is particularly true where jurisdiction in the sense of lack of power over the subject matter or person is involved, a *nisi prius* court should apply the traditional rule unless it is perfectly clear that the Supreme Court will not do so."

SUPREME COURT OF THE UNITED STATES

73

No. 71-6314

JAMES, ROY GOSA, PETITIONER

v.

J. A. MAYDEN, Warden

On petition for writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

June 19, 1972

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MICHAEL ROSEN, JR., C

IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-6314

JAMES ROY GOSA,

Petitioner,

v.

J. A. MAYDEN, WARDEN,

Respondant.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONER

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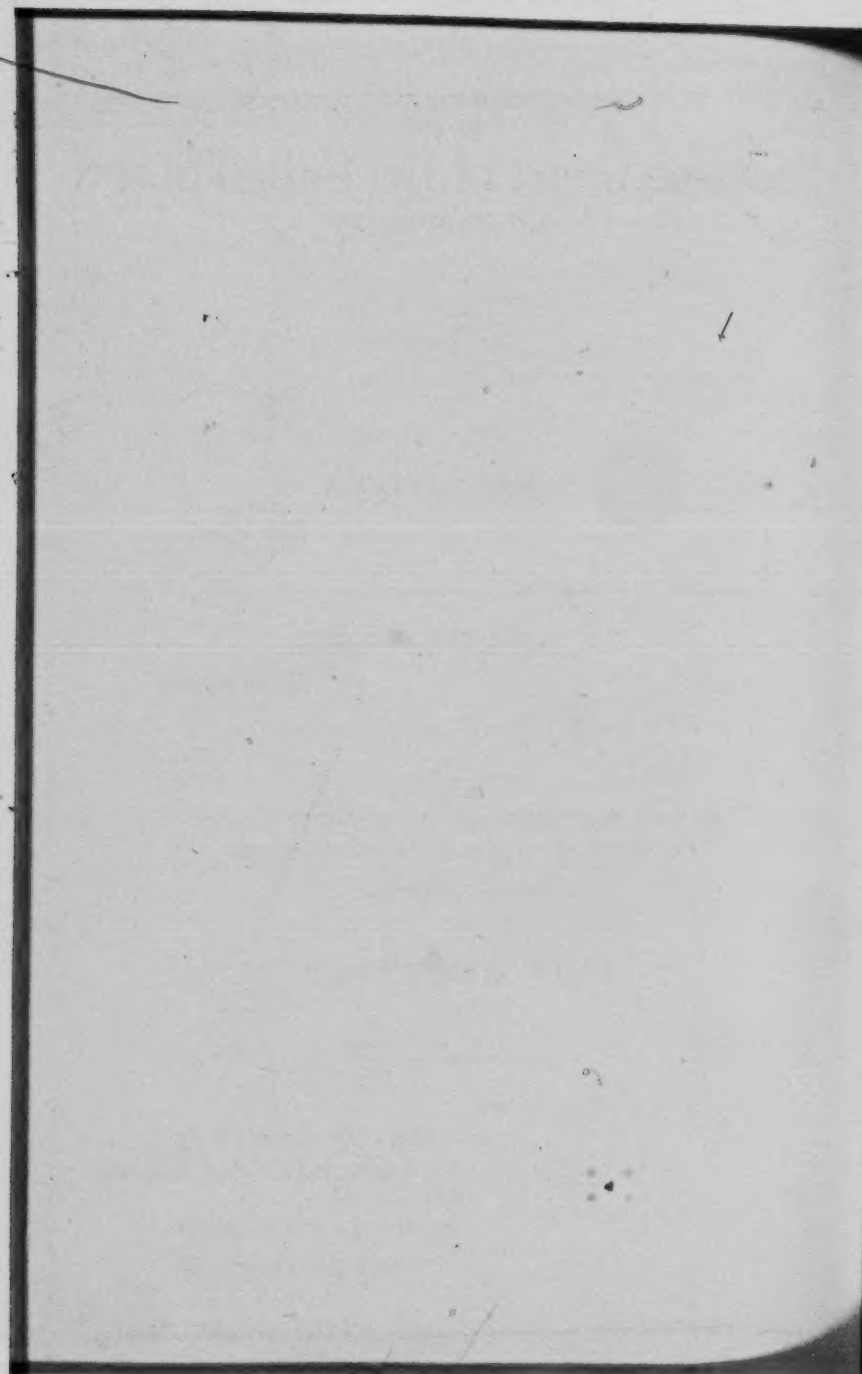


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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONER

OPINION BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit, denying Petitioners application for a Writ of Habeas Corpus appears as *Gosa v. Mayden*, 450 F.2d. 753 (5th Cir.) 1971. (A. 35).

JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit was entered on October 12, 1971. (A. 35). Pursuant to application for extension of time for filing Petition for Certiorari, and Order entered thereupon on January 6, 1972, Petition for Writ of Certiorari was filed on March 9, 1972, and was granted on June 19, 1972. The Jurisdiction of this Court was invoked under 28 USC §2101(c).

QUESTION PRESENTED

The sole issue presented is whether this Court's decision in *O'Callahan v. Parker*, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed. 2d. 291 (1969) will be applied to comparable proceedings of military courts which reached a stage of complete finality prior to June 2, 1969.

STATEMENT OF THE CASE

On August 13, 1966, James Roy Gosa was a member of the United States Air Force, stationed at Warren Air Force Base, Cheyenne, Wyoming. Just prior to midnight, on the night in question, he was officially off-duty with the permission of his superior officers, had left the military post dressed in civilian clothing and allegedly raped a civilian in the City of Cheyenne, Wyoming. The alleged victim was not on any type of military duty and had no direct or indirect relationship with the military. Gosa was arrested by civil authorities and charged for forcible rape. Gosa was unable to make bond and was confined until preliminary hearings on September 23, 1966, when he was released upon failure of the complaining witness to appear. He was immediately taken

into military custody and charged with violation of Article 120, Uniform Code of Military Justice (U.C.M.J.) and 10 USCA § 920, which provides that any person subject to the Code who commits an act of rape may be punished as a Court-martial may direct.

Pursuant to the provisions of sub-chapters IV and V, U.C.M.J. (10 USCA § 816-829), a General Court martial was duly convened which tried Gosa and on December 2, 1966, found him guilty as charged. A sentence was imposed of forfeiture of all pay and allowances, confinement of hard labor for ten (10) years and a bad conduct discharge (A. 22 R. 29-30). All of the multiple review procedures provided by the U.C.M.J. were accorded.

On July 11, 1967, Gosa petitioned the Court of Military Appeals for a grant of review under Article 67, U.C.M.J., (10 USCA § 867). All direct review procedures were exhausted and Gosa's conviction became final in law on August 16, 1967, when the Court of Military Appeals denied review (A. 26 R. 110).

On August 21, 1969, (A. 1 R. 2), Gosa filed his application for Writ of Habeas Corpus in the United States District Court for the Northern District of Florida and on November 6, 1969, filed in the United States Court of Military Appeals a Motion to Vacate his sentence and conviction. Both the application and the Motion were based on assertions that Gosa's confinement was invalid in light of the decision in *O'Callahan v. Parker*, that the general Court-martial which tried him lacked jurisdiction. The Court of Military Appeals treated the Motion to Vacate as a Petition for Reconsideration, which was denied, *Gosa v. United States*, (19 USCMA 327, 41 C.M.R. 327, (1970) (A. 27). The application for a Writ of Habeas Corpus in the United States District Court

was denied on November 13, 1969. *Gosa v. Mayden*, 305 F. Supp., 1186 (N.D. Fla. 1969). (A. 30).

It was stipulated before the United States Court of Appeals for the Fifth Circuit that the offense allegedly committed did not involve any question of flouting the military authority, the security of the military post or the integrity of military property. There was no connection whatsoever between Gosa's military activities and the alleged crime.

Appeal was taken to the United States Court of Appeals for the Fifth Circuit and on October 12, 1971, the opinion of the United States District Court for the Northern District of Florida, was affirmed and Gosa's application for Writ of Habeas Corpus was denied. *Gosa v. Mayden*, 450 F.2d. 753 (5th Cir. 1971). (A. 35).

ARGUMENT

I.

THE COURT MARTIAL WHICH TRIED GOSA HAD NO JURISDICTION UNDER THE CONSTITUTION OF THE UNITED STATES

A Court-martial is purely a creature of statute and has only such powers as are delegated by statute. There is no presumption of jurisdiction in its favor as exists in Courts of General Jurisdiction. Furthermore, statutory language is construed to conform as near as may be to judicial guarantees that protect the rights of the citizen and Courts will attribute to Congress a purpose to guard jealously against dilution of the liberties of the citizen that would result if the jurisdiction of military tribunals were enlarged at the expense of civil Courts. (*Lee v. Madigan*, 358 U.S. 228, 79 S.Ct., 276, at page 277).

The Fifth Amendment to the Constitution of the United States provides that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger. . . ."

The question with which we are concerned here is what is meant by and language, "except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger."

As this Court said in *O'Callahan v. Parker*, 89 S.Ct., 1683, 395 U.S. 258:

"If the case does not arise in the land or naval forces, then the accused gets first benefit of an indictment by a grand jury and second, a trial by jury before a civilian Court as guaranteed by the Sixth Amendment and by Art. III § 2, of the Constitution which provides in part:

"The Trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the Trial shall be at such place or places as the Congress may by law have directed."

"Those civil rights are the constitutional stakes in the present litigation. . . ."

"The fact that Courts-martial have no jurisdiction over nonsoldiers, whatever their offense, does not necessarily imply that they have unlimited jurisdiction over soldiers, regardless of the nature of the offenses charged. Nor do the cases of this Court suggest any such interpretation. The Government emphasizes that these decisions—especially *Kinsella*

v. Singleton—establish that liability to trial by Court-martial is a question of 'status'—"whether the accused in the Court-martial proceeding is a person who can be regarded as falling within the term "land and naval forces." 361 U.S. at 241, 80 S.Ct. at 301. But that is merely the beginning of the inquiry, not its end. "Status" is necessary for jurisdiction; but it does not follow that ascertainment of "status" completes the inquiry, regardless of the nature, time and place of the offense." (89 S.Ct. at pages 1685, 1687 and 1688).

In *O'Callahan*, this Court held, (1) that status of the offender as a person who can be regarded as falling within the terms "land and naval forces" is necessary for jurisdiction of Courts-martial, but that status does not in itself subject the offender to such jurisdiction; (2) that to be under military jurisdiction, the crime must be service-connected so that members of the armed services will not be deprived of the benefit of indictment of grand jury and trial by jury of his peers; (3) That the crimes of a soldier who during the peace time and while on evening pass allegedly entered the residential part of a Honolulu Hotel where he broke into a room of a young girl and assaulted and attempted to rape her, were not service-connected and that the soldier cannot properly be tried therefore by court-martial.

This Court in *O'Callahan* finally held:

"We have concluded that the crime to be under military jurisdiction must be service connected, lest cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger,' as used in the Fifth Amendment, be expanded to deprive every member of the armed services of the benefits on [sic] and indictment by a grand jury and a trial by a jury of his peers . . . we

see no way of saying to servicemen and service-women in any case the benefits of indictment and of trial by jury, if we conclude that this Petitioner was probably tried by court-martial.

"In the present case petitioner was properly absent from his military base when he committed the crimes with which he is charged. There is no connection—not even the remotest one—between his military duties and the crimes in question. The crimes were not committed on a military post or enclave; nor was the person whom he attacked performing any duties relating to the military. Moreover, Hawaii, the situs of the crime, is not an armed camp under military control, as are some of our far flung outposts.

Finally we deal with peacetime offenses, not with authority stemming from the war power, Civil Courts were open. The offenses were committed within our territorial limits not in the occupied zone of a foreign country.

The offenses did not involve any question of a flouting of military authority, the security of a military post, or the integrity of military property.

"We have accordingly decided that since Petitioner's crimes were not service connected, he could not be tried by court-martial but rather was entitled to trial by the civilian Courts." (89 S.Ct. at pages 1690, 1691, 1692.)"

In *Relford v. Commandant, U.S. Disciplinary Barracks*, 401 U.S. 355, 91 S.Ct. 649, 28 L.Ed., 2d 102 (1971) this Court enumerated twelve factors which, if present, deprive a military court-martial of jurisdiction to try a member of the armed forces otherwise under the jurisdiction of that Court by the mandate of Article 3 U.C.M.J. (10 U.S.C.A. §802).

- “1. The servicemen’s proper absence from the base.
2. The crime’s commission away from the base.
3. Its commission at a place not under military control.
4. Its commission without our territorial limits and not in an occupied zone of a foreign country.
5. Its commission in peacetime and its being unrelative to authority stemming from the war power.
6. The absence of any connection between the Defendant’s military duties and the crime.
7. The victim’s not being engaged in the performance of any duty relating to the military.
8. The presence and availability of a civilian Court in which the case can be prosecuted.
9. The absence of any flouting of military post.
10. The absence of any threat of a military post.
11. The absence of any violation of military property.”

One might still add other factor implicit in the others:

12. “The offenses’s being among those traditionally prosecuted in civilian Courts.” 28 L.Ed. at 109.

The total lack of jurisdiction of the Court-martial is clearly demonstrated by the finding of the United States Court of Appeals for the Fifth Circuit in its opinion of *Gosa v. Mayden*:

"Each of these factors is unquestionably present in Gosa's case; indeed the only distinction, locale—the Territory of Hawaii vis-a-vis the State of Wyoming—if effective at all, makes Gosa's case stronger. Indubitably had O'Callahan been rendered prior to the events in Gosa's case, the decision would have deprived the general court-martial which tried Gosa of jurisdictional authority to hear or determine that cause. . . ." 450 F.2d. at 755."

A finding of guilt by a Court having no jurisdiction renders the finding of guilty and the sentence against Gosa, annulity or no force or effect. The Doctrine is well stated in 49 C.J.S. § 401, page 794, we quote:

"***a judgment which is absolutely void is entitled to no authority or respect, and therefore may be impeached at any time, in any proceedings in which it is sought to be enforced or in which its validity is questioned, by anyone with whose rights or interest it conflicts."

II.

PURPOSE-RELIANCE-EFFECT TEST NOT APPLICABLE.

As so clearly stated by Judge Godbold, below, the "purpose-reliance-effect" test of *Stovall v. Denno*, 388 U.S. 293, 87, S.Ct. 1967, 18 L.Ed. 2d. 1199 (1967), "is not a substantive end in itself but a tool of sorts. . . ."

Judge Clark, in writing the majority opinion below, grounded the finding of the Court on the effect on the administration of justice of the retro-active application of *O'Callahan*. The sole figure provided by the United States Air Force, at the request of the Court below, was as follows:

"In response to the request for this Court, the Department of the Air Force has advised that its

court-martial systems have processed 475,349 cases since 1949 and although the sheer bulk of analysis prevented a case by case examination, 2-year sampling indicated to the Solicitor General of the United States that 5% would constitute a reasonable working hypothesis of the number of cases that could raise a retroactive *O'Callahan* issue." 450 F.2d. 753 at 766.

Judge Weinstein, in commenting on the Government's position to the impact on the judicial administration stated:

"It is not clear how many men presently incarcerated are involved, but if they have been deprived of liberty by a body lacking power to do so, they should be released. Much of the administrative burden created by applications for more favorable forms of discharge may be handled by congressional adoption of a short statute of limitations or by administrative remedies." *Flemings v. Chafee*, 330 F. Supp. 193 (E.D.N.Y. 1971)

A. Appeal and Administrative Hearing Results

The most far reaching statistical analysis of the effect on administration of justice by retroactive application of *O'Callahan* is contained in 60 Georgetown Law Journal 551. Blumenfeld, *Retroactivity after O'Callahan: An Analytical and Statistical Approach*, 60 Geo.L.J. 551 (1972). In that article, Mr. Blumenfeld recites statistics to show that at least the present trend would suggest that retroactive application of *O'Callahan* would not adversely effect the administration of Justice. Mr. Blumenfeld cites the following specific examples: *Blumenfeld, supra*, 60 Geo.L.J. at 579-580.

1. Of hundreds of case files in the office of the Defense Appellate Division of the United States Army Judiciary, only 16 presented arguable grounds for seeking relief if *O'Callahan* were retroactive.
2. Of the petitions for relief which had been filed with the Examination and New Trials Division of the United States Army Judiciary, all but four seeking retroactive application have been denied on the grounds that the offenses were service-connected.
3. Records of the Court of Military Appeals reveal that of the 63 petitions for extraordinary relief on the basis of *O'Callahan* received prior to February 1, 1971, 47 concerned service-connected offenses wherein relief has been denied regardless of the retroactivity issue.
4. The number of reversals by the Court of Military Appeals and the Army Court of Military Review on direct appeal indicate that few trials during 1968 and 1969 involve non-service connected crimes. From June 2, 1969, until December 31, 1970, over 4,900 Appellate opinions were filed in cases which were tried before *O'Callahan* was decided. Of that number, the Army Court of Military Review set aside one or more offenses in thirty cases.

B. Civilian-Type Crimes Are On-Post Incidents

Mr. Blumenfield further recites:

"Most civilian-type crimes tried by the military were on-post incidents. For example, 80 percent of all murders committed on a military reservation were tried by Courts-martial; 98 percent of the indecent assaults taking place on post were disposed of by military tribunals; 95 percent of the housebreaking on military post were processed by the services; 93

percent of all on-post larcenies became military cases. It seems that the civilian-type crimes tried by Court-martial a predominant number contain the requisite on post factor."60 Geo. L.J. 551 at 580.

C. Off Post-Civilian-Type Crimes Tried by Civil Courts

As to off-post civilian type crimes committed by servicemen, Mr. Blumenfeld, 60 Geo. L.J. 580 at 551, recites statistics that 80 percent of all off-post civilian type crimes by servicemen, in 1968 were tried in state or federal courts.

The full impact of the foregoing statistics clearly indicates that the great fear of a retrial of 23,767 cases in the Air Force alone, as expressed by Judge Clark below, is totally unfounded on any fact or figure.

D. No Administrative Burden

The other administrative burden falls basically into two categories; First, the review of Court Martial Records and,

Second, the financial ramifications if *O'Callahan* were deemed retroactive.

If *O'Callahan* were applied retroactively, the appropriate remedy for any convicted serviceman would be to seek relief from the military department which imposed the sentence and conviction. Thus the branches of the military could and should establish procedures to handle petitions. A review of the trial record would quickly disclose necessary information as to the location, status, date and offense. Application of *O'Callahan* could be readily determined all but a few cases.

The financial ramifications did not present the burden supposed. Mr. Blumenfeld, 60 Geo. L.J. 551 at 574 points out:

1. Most of the servicemen involved have such short lengths of service that they would not be entitled to any retirement pay or pension.
2. Administrative procedures are already established for the compensation of servicemen where forfeitures have been set aside by Appellate procedures.
3. If the serviceman has not returned to active duty after confinement he has no additional claim except for the amount of money forfeited and compensation for time spent in confinement.
4. In the case of a serviceman returning to duty after confinement at a reduced pay rate, an additional compensation might have to be provided.

Each of the foregoing financial ramifications presents no greater a burden on the military department than the setting aside of a forfeiture of pay after Appellate or administrative review.

The burden on the State and Federal Trial Court system need not materialize. In most instances the examination of the record, without any evidentiary hearing, would be all that is necessary to determine whether or not the conviction and sentence should be set aside on the basis of *O'Callahan*.

E. Chances For Re-Trial in Civil Jurisdiction

Even after a determination that the sentence and conviction should be set aside, there are many factors which might mitigate against the actual retrial of the case in a civil jurisdiction.

1. The statute of limitations may have run.
2. The sentence may have been served.
3. The nature of the crime may be such that the prosecutor may not deem it worthwhile to prosecute.
4. The absence and loss of witnesses due to time.
5. Possible extradition to other jurisdictions.
6. The conduct and behavior of the serviceman indicate that no further prosecution is necessary.

Each of the above factors mitigating retrial become more relevant with the passage of time. Except in the rare instance, the crimes which would come up for review under a retroactive application of *O'Callahan* would have committed prior to 1969. Thus, more than three years has already lapsed which strengthens the above factors mitigating against retrial.

CONCLUSION

It is therefore submitted:

1. That the crime of which Gosa was convicted was not service connected; that the civilian courts of Wyoming were open to prosecute Gosa; and that the court-martial had no jurisdiction;
2. That the doctrine of retroactivity has no application to a case in which the court lacked jurisdiction of the subject matter and therefore the judgment is void;
3. That the rights violated are of such fundamental importance that retroactive application of *O'Callahan* is required;
4. That the holding in *O'Callahan* was not such an abrupt and fundamental change in principle as to constitute an entirely new doctrine, requiring prospective application only; and

5. That there would be no adverse effect on administration of justice;

For the foregoing reasons the opinion below should be reversed and *O'Callahan* should be applied retroactively to comparable proceedings of military courts which reached a stage of complete finality prior to June 2, 1969.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6314

JAMES ROY GOSA, PETITIONER

v.

J. A. MAYDEN, WARDEN

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT**

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the court of appeals (A. 35-72)¹ is reported at 450 F.2d 753. The opinion of the district court (A. 30-33) is reported at 305 F. Supp. 1186.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1971. Mr. Justice Stewart extended the time within which to file a petition for a writ of certiorari to March 10, 1972, and the petition was filed on March 9,

¹ "A." references are to the Appendix filed in this Court.

1972; it was granted on June 19, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the holding of *O'Callahan v. Parker*, 395 U.S. 258, should be applied retroactively to invalidate a conviction that had become final before the date of that decision.

STATEMENT

Following a general court-martial in December 1966, petitioner, then an airman third class stationed at Warren Air Force Base in Wyoming, was convicted of having committed rape, in violation of 10 U.S.C. 920 (Article 120 of the Uniform Code of Military Justice). He was sentenced to ten years' incarceration at hard labor, forfeiture of all pay and allowances, a reduction in rank to the grade of Airman Basic and a bad conduct discharge (A. 3, 22). On March 10, 1967, the Staff Judge Advocate recommended that the findings and sentence of the general court-martial be approved (A.5-21); the following day, they were approved by the convening authority (A. 22-23). On review by an Air Force Board of Review, pursuant to 10 U.S.C. 866 (Article 66, U.C.M.J.), the conviction and sentence were affirmed (A. 24-25). The United States Court of Military Appeals denied a petition for review on August 16, 1967 (A. 26).

The material facts in this case are not in dispute. As set forth in the opinion of the Staff Judge Advocate (A. 5-12), on August 13, 1966, petitioner accosted and raped a civilian in Cheyenne, Wyoming; the victim was not in any way connected with the military or related to

military personnel. The offense took place away from Warren Air Force Base, at a time when petitioner was officially off-duty and was absent from the base on an authorized leave; he was dressed in civilian clothes. Shortly after the rape, petitioner was arrested by civilian authorities, and, unable to make bond, was detained until a preliminary hearing was held in the state court on September 23, 1966. Following the hearing, he was released for failure of the victim to appear. He was immediately taken into military custody and charged with violating Article 120, U.C.M.J. The victim testified at petitioner's court martial, and he was convicted.² Sentence was adjudged on December 2, 1966 (A. 22), and the conviction became final on August 16, 1967, when the United States Court of Military Appeals denied review (A. 26).

On June 2, 1969, this Court decided *O'Callahan v. Parker*, 395 U.S. 258, invalidating the court-martial conviction of a serviceman for a non-service-connected offense (assault with attempt to commit rape) on the ground that he had been denied his constitutional rights to indictment by a grand jury and to trial by jury in a civilian court. Petitioner then instituted this habeas corpus action in the United States District Court for the Northern District of Florida, relying on *O'Callahan* and seeking release from his present confinement at the

² The victim testified that she had not appeared in the state proceedings "because she did not want the publicity and she didn't want to get [another man] involved in it. Further, she was supposed to be out of town because the police had told her to leave. She had been convicted of shoplifting in May of 1966" (A. 10).

Federal Correctional Institute, Tallahassee, Florida.³ The district court denied the writ (A. 30-33). While finding the rape offense, on the particular facts of this case, to be non-service-connected, it held that *O'Callahan* was not entitled to retrospective application under the tripartite interest balancing test formulated in *Stovall v. Denno*, 388 U.S. 293. A divided court of appeals (A. 35-72) affirmed.⁴

ARGUMENT

This case raises the question left open in *Relford*: whether *O'Callahan* should be given retroactive effect to upset countless court-martial convictions (such as the one here) that have been rendered over many years under the mandate of Congress. We have fully briefed that issue in *Warner v. Flemings*, No. 71-1398 (Pet. Br. 11-38), the companion case to this one.⁵ For the reasons set forth at length in our *Flemings* brief, we submit that the new constitutional principle announced in *O'Callahan*, if adhered to, should be applied only prospectively.⁶

³ On November 6, 1969, petitioner also filed a motion in the United States Court of Military Appeals to vacate his conviction and sentence, also relying on *O'Callahan*. Treating the motion as a petition for reconsideration, the military court denied relief (A. 27-29; 19 U.S.C.M.A. 327, 41 C.M.R. 327). It relied on its previous decision in *Mercer v. Dillon*, 41 C.M.R. 264, 19 U.S.C.M.A. 264, holding that *O'Callahan* does not apply to cases which had become final before the date of that decision.

⁴ It was stipulated in the court below that the petitioner's rape of a civilian was, in view of the surrounding circumstances, a non-service-connected crime. Compare *Relford v. Commandant*, 401 U.S. 355.

⁵ A copy of our brief has been furnished to petitioner.

⁶ The court-martial conviction in this case, unlike *Flemings*, took place after enactment of the 1950 Uniform Code of Military Justice.

Whether, as we urge in our brief in *Flemings* (p. 38, n. 34), *O'Callahan* should at most apply to court-martial trials begun after the date of that decision, or whether it should also apply to proceedings that were then pending at any stage of trial or review, that decision should not be applied to petitioner's conviction, which had become final nearly two years before *O'Callahan* was decided.

1. Petitioner seems to make two basic arguments in favor of retroactivity. The first is that the court martial that tried him had no "jurisdiction" under the Constitution to try him. In our brief in *Flemings* (pp. 11-17), we set forth why we believe the references to a jurisdictional basis for the decision in *O'Callahan* do not resolve the retroactivity inquiry. As we there argue, whatever may be the import of the jurisdictional language of that opinion, the fundamental analysis to be used in deciding whether the decision has retroactive effect remains the same as in other retroactivity cases.

2. Petitioner's second major point concerns one of the three traditional factors this Court has determined to be relevant in making the retroactivity decision: what would be the impact of retroactive application on the administration of justice. (No discussion is offered on the other two relevant factors: the purpose of the constitutional rule announced in *O'Callahan* and the extent of justifiable government reliance on the pre-*O'Callahan* law.) The essential thrust of the argument seems to be that the alleged administrative and judicial burdens that would likely flow from such a holding—

That distinction, however, as we point out in our brief in *Flemings* (Pet. Br. 27-29), should not be determinative in deciding how *O'Callahan* should be applied.

which is one of the factors that the court below found weighed against retroactivity (A. 65-67)—have been vastly overstated.

It is, of course, impossible at this time to assess in absolute terms the impact on both the military and the civilian courts of a decision in this case in favor of retroactivity. But, as we have shown in our brief in *Flemings* (pp. 33-38), the potential administrative and judicial burdens likely to result from such a holding appear considerable. Petitioner's argument to the contrary rests essentially on several observations made in the Blumenfeld article, *Retroactivity After O'Callahan: An Analytical and Statistical Approach*, 60 Geo. L.J. 551 (1972). As even the observations petitioner cites illustrate, however, there is a substantial administrative burden in ascertaining—or trying to ascertain—whether a particular offense is “service connected”—a process that in a sense has been complicated by the enumeration of a dozen relevant factors in the Court's recent decision in *Relford*. Even if relief under *O'Callahan* (and *Relford*) would ultimately be awarded only in a relatively small percentage of the many hundreds of thousands of outstanding court-martial convictions, the process of administratively reconstructing the relevant factors and judicially reviewing the assessment must plainly be regarded forbidding.

“Moreover,” as we stated in *Flemings* (p. 38), “even the possibility that the number of convictions actually challenged might turn out to be fewer than seems likely should not materially discount the significance of the impact of a holding of retroactivity, since the ‘purpose’ and ‘reliance’ factors, as we have shown [see our brief

in *Flemings* at pp. 19-33], so strongly counsel against imposing the burden."

3. In view of the similarities between this case and *O'Callahan*, the Court may wish to reconsider that decision, which was rendered when less than the full Court was available to pass upon the extremely important constitutional question involved: whether a serviceman on active duty and unquestionably subject to general military discipline can properly be courtmartialled for criminal conduct that is not "service connected."

CONCLUSION

For the foregoing reasons, and for the reasons set forth in our brief in *Warner v. Flemings*, it is respectfully submitted that the judgment of the court appeals should be affirmed.

ERWIN N. GRISWOLD,
Solicitor General.

HENRY E. PETERSEN,
Assistant Attorney General.

PHILIP A. LACOVARA,
Deputy Solicitor General.

Wm. BRADFORD REYNOLDS,
Assistant to the Solicitor General.

ROGER A. PAULEY,
SHIRLEY BACCUS-LOBEL,
Attorneys.

SEPTEMBER 1972.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1971

No. 71-1398

JOHN W. WARNER, SECRETARY OF NAVY,
Petitioner,

—v.—

JOHN W. FLEMINGS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

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RELEVANT DOCKET ENTRIES

1970

October 8, 1970—Complaint Filed.

1971

January 29, 1971—ANSWER of deft U.S.A. filed. (affid of srv by mail on 1-29-71).

March 19, 1971—Letter of Michael Meltser & motion for summary judgment filed.

April 22, 1971—Notice of Cross-Motion and memorandum filed, pursuant to Rule 12(b), dismissing complaint, & Rule 56 for summary judgment in favor of deft etc. (ret April 27, 1971)

April 22, 1971—Statement of material facts filed.

April 22, 1971—Statement of material facts filed.

April 27, 1971—Before WEINSTEIN, J.—Hearing on deft's motion for summary judgment—Motion argued—Decision reserved for 60 days to all pr for administrative action—Order to be submitted.

April 30, 1971—By WEINSTEIN, J. Order filed that this Court retains jurisdiction pending Pltff's application to the Judge Advocate General, U.S. Navy & the Board for Correction of Naval Records, and final decision rendered. etc. this Court will proceed to a determination of the motions submitted (P/C mailed to attys).

May 18, 1971—Letter from Atty. for Pltff. to Judge Weinstein dtd. 5-14-71 and Affidavit of Pltff. John W. Flemings Filed.

July 19, 1971—By WEINSTEIN, J.—MEMORANDUM & ORDER FILED. Pltff's court-martial conviction for automobile theft must be vacated. His request that the Board for Correction of Naval Records be directed to grant him a general discharge under honorable conditions must be denied. etc. The offense of being absent without leave etc. The matter is remanded to the board with instructions to erase the conviction for automobile theft and the dishonorable discharge etc. (P/C mailed to attys).

September 16, 1971—NOTICE OF APPEAL FILED. (deft) (copy of appeal mailed to Michael C. Meltsner, Esq. Columbia University School of Law, 435 W. 116th St. N.Y.)

IN THE UNITED STATES FEDERAL DISTRICT
COURT FOR THE EASTERN DISTRICT OF
NEW YORK

Civil File No. 70C 1267

UNITED STATES OF AMERICA
EX. REL. JOHN W. FLEMINGS, PLAINTIFF

v.

JOHN H. CHAFEE, Secretary of the Navy, DEFENDANT

COMPLAINT FOR A MANDATORY INJUNCTION

TO: The Honorable President Judge of the above court.

Come now, John W. Flemings, relator, who disposes and says he is a natural born citizen of the United States. That the Courts Martial and Dishonorable Discharge he received from the United States Navy is inconsistent with due process of law, as guaranteed him by the 5th and 6th Amendments of the Federal Constitution. That such abusive stigmatism he is still marked, chatters the very essential principles instituted in the Bill of Rights as intended by the Framers. Therefore, he comes before this Honorable Court to rectify the injustice bestowed upon him. Relator will tentatively show his Constitutional rights has been violated adduced from the following cogent facts.

JURISDICTION

Relator concedes that he does not know the proper act to invoke jurisdiction upon this Honorable Court. However, Relator would draw this Honorable Court's attention to other reference that seems merited heretofore; i.e.,

Chief Justice Earl Warren, The Bill of Rights and the military, 37 N.Y.U.L. Rev. 181 (1961); Henderson, Courts Martial and the Constitution: The Original Un-

derstanding, 71 Harv. L. Rev. 293 (1957); Avins, accused right to defense counsel before a military Court, 42 U. Det. L. J. #21 (1964); C. F. Wiener, Courts Martial and the Bill of Rights, 72 Harv. L. Rev. (1958).

Federal Constitutional Questions Involved

1. Was Relator denied due process of law as embodied under the 5th and 6th Amendments of the Constitution of the United States, whereby: The military Tribunal Court of Justice lacked jurisdiction to Preside over the alleged offense of auto larceny which is outside the province of the Uniform Code of Military Justice; nor was he afforded counsel anterior to trial?

2. Was relator denied due process of law as embodied under the 6th Amendment of the Constitution of the United States, whereby: The court appointed counsel to represent him at trial was not a counsel as term under the 6th Amendment?

STATEMENT OF CASE HISTORY

Relator at the age of eighteen (18) joined the United States Navy. After training at Great Lakes Illinois, I was sent to an ammunition Depo at Earl, New Jersey. One weekend I obtained a 72 hour leave, I decided to hitch-hike a ride to Pittsburgh, Pennsylvania, because of financial reasons. While on the road just outside of Norristown, Pennsylvania, a sailor stopped his car and gave me a lift.

When we road into Lewistown, Pennsylvania, it was noted that the gas tank was almost empty. He inquired whether I had any money. I informed him that I didn't have any money for gas because I was broke. The sailor informed me that he did not have enough money to buy the necessary gas, so he would have to try to make a deal with the two spare tires which were in the trunk of the car. When we arrived shortly thereafter to a gas station he took the aforementioned tores inside the station. Subsequently he and the Station Attendant came outside wherein some gas was put in the tank and we continued our journey on highway 322.

Around about dusk he pulled the car on the side of the road stopping in front of a farm house. He told me that he was going to the house to see if a friend was home and he would be right back. While I sat in the car awaiting for his return, two state troopers drove and stopped. One of the troopers came over to the car and asked me what I was doing there. I explained about the ride I had been given from an unknown fellow sailor and I was trying to reach Pittsburgh; and at the present time I was awaiting his return from the said house of his friend. Meanwhile, the trooper who stayed in their car observed the unknown sailor hightailing up a hill behind the said house.

The troopers took me to their barracks located in Hollidaysburg, Pennsylvania, where I then learned that the car was stolen.

After further questioning the state troopers took me back to the said gas station in order to find out if my statement was true or false. The gasoline attendant's statement and affidavit corroborates that I was not the person who drove the car nor the person who traded the two spare tires with him.

Consequently I was taken back to my base at Earl, New Jersey, which I did not see anybody for a period of eight or nine weeks. Then I was taken to Pier 92 and given a hearing, wherein it was incomplete by virtue I was not afforded the assistance of counsel, also the Constitutional Right of confrontation of the witnesses against me, whereas *notwithstanding no witnesses appeared at the said proceeding in regards the alleged offense*. Upon conclusion of the inexpressible said proceedings the judicial personnels told me that I would be recommended for a general Courts Martial.

Afterward I was taken to Hearts Island, New York, where I was lodged there for approximately five weeks, and then taken to the Brooklyn Navy Yard. While being at the latter place I met the said Lt. Folly whom informed me that he was appointed to represent my pending case. During the interview he advised me to enter a plea of guilty to the said charge because I would only get a "moderate sentence" instead of ten years; plus, the fact that the weight of the evidence was against me.

Thereafter I was carried back to Hearts Island, New York for about four days, and then brought back to the Brooklyn Naval Yard to stand trial. Being young at the age of 18 it's obvious that only through frustration and the complexities of law, I did unknowingly and unintelligently entered a plea of guilty before the Military Tribunal sitting en banc.

Upon the conclusion the said court found me guilty as charged, wherein the Court imposed a sentence of three years and stand committed at Portsmouth, New Hampshire after serving twenty-six months in confinement I was released and given a Dishonorable Discharge.

SUMMARY OF ARGUMENT

Relator alleges that he was denied the very conception of the basic essential fundamental concept of due process, and such, is a deprivation of his personal liberties based upon the following grounds:

(1) The alleged offense of auto larceny is a civil and/or criminal litigation, but it does not come under jurisdiction of violation of the Uniform Code of Military Justice. Therefore the proceedings of the Military Tribunal in this case, was invalid and void without jurisdiction to proceed.

(2) It is a well established law that the accused has the constitutional right of confrontation to cross-examine the accusers against them.

Indeed it's impossible to fathom how in the world could a United States prosecutor present a prima facie case in view of the fact that there were no witnesses or corroborated statements introduced into evidence at the hearing nor at the trial itself.

(3) It is a settled law, that an indigent person is entitled the assistance of counsel as termed under the 6th Amendment by the Bill of Rights. And anything less thereto, is an enroachment of relators undividual personal liberties, and the abuse injustice that manifested in this case at bar, should be expunged forthwith, so that, justice will prevail.

ARGUMENT

The record affirmatively shows that relator was given a preliminary hearing, without the assistance of counsel, for the alleged offense of auto larceny, before a military court contrary to conformity in due process it is settled law that an accused is entitled to counsel at all "critical stages" of the criminal litigation where rights may be preserved or lost. SEE *White v. Maryland*, 373 U.S. 59, 10 L. ed. 193, 83 S. Ct. 1050 (1963).

Relator alleges that since the said criminal offense was lodged against him, the sole jurisdiction lied within a civilian tribunal court of law, and not, within violation of the uniform code of Military Justice. SEE Application of James E. Stapley P.F.C., United States Army, for writ of Habeas Corpus; filed in United States District Court, District of Utah, at civil no. C-188-65 (1965).

Amendment V, of the Federal Constitution held in part: "Trials for crimes; . . . No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; . . . Nor shall any personal be subject for the same offense to be twice put in jeopardy of life or limb; Nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty or property, without due process of law—"

In the light of the alleged offense of auto larceny that did not arise in any connection with the naval force, the action taken by the Military personnels was ab initio and lacked jurisdiction thereto. Therefore, the monstrous procedure that transpired resulted baing a denial of due process of law as instituted therein Amendment V(5) Supra.

It is further alleged as to said preliminary hearing that in the case of *Pointer v. Texas*, 380 U.S. 400 (1965) the United States Supreme Court held that the sixth Amendment guarantees a defendant the right "to be

confronted with the witnesses against him" which include the right to cross-examine those witnesses.

It is evident that since no witnesses appear at relator's hearing while being without counsel, nor did any witnesses appear before the Military Tribunal Court of Justice, wherein they could be cross-examined in regards of the truth or falsehood of the alleged offense, such proceedings, in itself constitutes a denial of the safeguards essential to a fair trial. Pointer supra.

Speaking of confrontation and cross-examination the United States Supreme Court ruled in the case of *Greene v. McFlory*, 360 U.S. 474, that "they have ancient roots. They find expression in the 6th Amendment which provides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him." This court has been zealous to protect these rights from erosion—360 U.S., at 496-497.

Even if the Military Tribunal were authorized to adjudicate this instant case at bar, still relator was yet denied the basic fundamental rights as guaranteed him by the 6th Amendment which holds, i.e.;

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Significantly, in the 6th Amendment the words "speed and public" qualify the term trial and the rest of the amendment defines specific protections the accused is to have at his trial. Ergo, the 6th Amendment, by its own terms, not only requires that the accused have certain specific rights but also that he enjoy them at a trial—a word with a meaning of its own, SEE *Bridges v. California*, 314 U.S. 252, 271.

The findings of fact and conclusions of law will clearly reveal that relator at the age of 18 did not understand-

ingly and intelligently enter a plea of guilty for the said offenses, after being influenced by his court-appointed counsel attorney, Lt. Folly. Furthermore, relator alleges that the said appointed counsel was a denial of due process as term specifically by the 6th Amendment, i.e.,

"In all criminal prosecutions, the accused shall enjoy the right . . . To have the assistance of counsel for his defense," whereas: The qualifications of appointed defense counsel in the courts martial of relator were not adequate to constitute "counsel" and as required by due process of law, but that on the contrary the representation of your relator was in the nature of idle form or mockery of justice.

Minimal requirements of due process particularly in view of the 6th Amendment requires that counsel made available to relator had requisite competency or qualification in military or civilian laws and proceedings, or both, beyond that common to every officer in the military service, application or Stapley P.F.C. United States Army, Supra.

On March 18, 1963, the Supreme Court of the United States, decided that an accused indigent person, as relator in this instant case, is entitled to the assistance of counsel in a non-capital, criminal prosecution. SEE, *Gideon v. Wainwright*, 372 U.S. 335 (1963). Upon remanding Gideon's case the court used the principal of retrospective application of a constitutional right. SEE also, *Novell v. Illinois* 373 U.S. 420 (1963); *Eskridge v. Washington*, 357 U.S. 214 (1957).

It is a long established principle that a denial of a fundamental constitutional right takes away the jurisdiction of the trial court and renders void a sentence and conviction following. SEE *ex Parte Nielson*, 131 U.S. 176 (1888); *Johnson v. Zerbst*, 304 U.S. 458 (1938).

Although relator has already served the injustice of said sentence, it may be alluded that the situation has now become moot. Presumably the mootness be the case, can it morally, conscientiously, or legally, under our system of jurisprudence, be sanctioned without any course of redress, indeed not, for it would be repugnant towards

the very fundamental guaranteed rights of the constitution is supposed to maintain.

Relator has clearly shown, that he was tried, convicted and sentenced, for auto larcency, by an unauthorized Military Tribunal of Justice; That he was denied the Constitutional right of confrontation, that he was denied the right to "Counsel" as term in the 6th Amendment of the Bill of Rights; and such resulted a Courts Martial and Dishonorable Discharge and forfeiture of pay.

As presented and argued, in this instance at bar, relator has unequivocally shown a direct violation of due process. SEE *Ashe v. McNamara*, — F.2d — C.A. 1, Dec. 14, 1965.)

Relator asserts that he has definitely shown this Honorable Court a Prima Facie case.

Wherefore, in due consideration of the merits set forth herein by a layman in law, relator prays that this Honorable Court will entertain the foregoing petition as being the appropriate remedy, thereby issuing and order declaring the monstrosity said procedures foregoing, being void, ab initio and without jurisdiction; and that the same great writ be granted as the law and statutes so demand.

And we will ever pray,

Respectfully Submitted,

/s/ John W. Flemings
Relator (I.P.P.)

AFFIDAVIT

Appeared John Flemings, Relator, before me, the undersigned notary public, in and for the above said state and county, being sworn in accordance to law, deposes and says, that all the claims and allegations set forth in the foregoing petition is true and correct, to the best of his knowledge, information and belief.

/s/ John W. Flemings
Relator

Sworn to and subscribed before me, this 5th day of October 1970.

/s/ PETER W. SLAVANIE
(Notary Public)

JDP:BFS:pa
[Illegible]
F. 702098

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. 70 C 1267

UNITED STATES OF AMERICA ex
rel. JOHN W. FLEMINGS, PLAINTIFF

against

HON. JOHN H. CHAFEE, Secretary of the Navy,
DEFENDANT

ANSWER

The defendant, UNITED STATES OF AMERICA, by its attorney, EDWARD R. NEAHER, United States Attorney for the Eastern District of New York, in answering the plaintiff's complaint, alleges:

FIRST: Denies each and every allegation contained in plaintiff's complaint, except admits that on October 2, 1944, Seaman Second Class John W. Flemings was tried by general court martial at the U. S. Navy Yard, New York, New York, on charges of absence from station and duty after leave had expired and theft. Seaman Second Class Flemings pleaded guilty to both charges and was, accordingly, found guilty of both. The Court sentenced Seaman Second Class Flemings to be reduced to the rating of apprentice seaman, to be confined for a period of three years, and then to be dishonorably discharged. (A copy of those court martial proceedings is attached hereto as Exhibit 1.)

AS AND FOR A FIRST SEPARATE AND
COMPLETE AFFIRMATIVE DEFENSE

SECOND: This action is barred because it was not commenced within the applicable statute of limitations for this type of action.

WHEREFORE, defendant, HON. JOHN H. CHAFEE, demands judgment dismissing the plaintiff's com-

plaint and granting judgment to it, together with the costs and disbursements of this action, and for such other and further relief as to this Court may seem just and proper.

Dated: Brooklyn, New York, January 29, 1971

EDWARD R. NEAHER
United States Attorney
Eastern District of New York
Attorney for Defendant

By /s/ Bruce F. Smith
BRUCE F. SMITH
Assistant U. S. Attorney

EXHIBIT 1

Case of

JOHN W. FLEMINGS, Seaman second class, U.S.
Naval Reserve, 2 October 1944. 924-24-27

RECORD OF PROCEEDINGS

OF A

GENERAL COURT MARTIAL

CONVENED AT

THE NAVY YARD, NEW YORK

BY ORDER OF

[Illegible]

Copy furnished

A17-20
DHq-15

rem

HEADQUARTERS THIRD NAVAL DISTRICT
FEDERAL OFFICE BUILDING
90 CHURCH STREET
NEW YORK, N.Y.

15 September 1944.

To: Rear Admiral Lamar R. Leahy, U.S. Navy, Retired,
U.S. Navy Yard, New York, New York.

Subj: Precept for a General Court Martial.

1. Pursuant to the authority vested in me by the Secretary of the Navy (Navy Department's file A17-11 (1)/A17-20, dated 24 July 1943), a GENERAL COURT MARTIAL is hereby ordered to convene at the U.S. Navy Yard, New York, New York, at 10 o'clock a. m., on Monday, 18 September 1944, or as soon thereafter as practicable, for the trial of such persons as may be legally brought before it.

2. The court is composed of the following members, any five of whom are empowered to act, viz:

Rear Admiral Lamar R. Leahy, U.S. Navy, Retired,
Captain James H. Tomb, U.S. Navy, Retired, Captain
William K. Riddle, U.S. Navy, Retired, Commander
Walter M. A. Wynne, U.S. Navy, Retired, Major Robert
E. Adams, U.S. Marine Corps, Retired, Major Louis
E. Fagan, Junior, U.S. Marine Corps, Retired, Major
Arthur H. Turner, U.S. Marine Corps, Retired, Lieutenant
Commander Townsend H. Boyer, D-V(G), U.S.
Naval Reserve, Retired,

and of Lieutenant Commander Allen Blank, L-V(S), U.S.
Naval Reserve, Lieutenant Commander Thomas H. Davis
D-V(S), U.S. Naval Reserve, Lieutenant Commander
Francis M. Seaman, L-V(S), U.S. Naval Reserve, Lieutenant
Charles L. Larson, D-V(S), U.S. Naval Reserve,
and Lieutenant Edmund J. Fanning, D-V(S), U.S. Naval

Reserve, as judge advocates, any one of whom is authorized to act as such.

3. This court is hereby authorized and directed to take up such cases, if any, as may be now pending before the general courts-martial of which Rear Admiral Lamar R. Leahy, U.S. Navy, Retired, is president, appointed by my precepts of 3 April 1944, 10 May 1944, and 27 July 1944, except such cases the trial of which may have been commenced.

4. No other officers can be detailed without injury to the service.

5. Detachment of an officer from his ship or station does not of itself relieve him from duty as a member or judge advocate of a court. Specific orders for such relief are necessary.

6. This employment on shore duty is required by the public interests. You will inform the above-named members and the judge advocates who were appointed by said precepts of 3 April 1944, 10 May 1944, and 27 July 1944, that they will continue on court martial duty under their previous orders. The court is authorized to adjourn over any holiday prescribed by article 330, U.S. Navy Regulations, 1920.

/s/ W. R. Munroe
W. R. MUNROE
Rear Admiral, U.S. Navy,
Commandant, Third Naval
District, Task Force
Commander, Eastern Sea
Frontier.

A true copy. Attest:

/s/ Allen Blank
ALLEN BLANK
Lt. Comdr. USNR
Judge Advocate.

ND3/A17
DHq-15

HEADQUARTERS THIRD NAVAL DISTRICT
FEDERAL OFFICE BUILDING
90 CHURCH STREET
NEW YORK, N.Y.

924-94-27

WS:bh

(2909)

21 September 1944.

To: Judge Advocate, General Court-Martial, U.S. Navy
Yard, New York, New York, convened by Comandant,
Third Naval District, and Task Force Commander,
Eastern Sea Frontier precept dated 15 September 1944.

Subj: Charges and specifications in the case of John W.
FLEMINGS, seaman second class, U. S. Naval Reserve.

1. The above named man will be tried before the
general court martial, of which you are judge advocate,
upon the following charges and specifications. You will
notify the president of the court accordingly, inform the
accused of the date set for the trial, and summon all
witnesses both for the prosecution and the defense.

CHARGE I

ABSENCE FROM STATION AND DUTY AFTER
LEAVE HAD EXPIRED

SPECIFICATION

In that John W. Flemings, seaman second class, U. S.
Naval Reserve, having, while so serving on active duty
at the U. S. Naval Barracks, Naval Ammunition Depot,
Earle, New Jersey, been granted leave of absence from
his station and duty at said barracks, to which he had
been regularly assigned, said leave to expire on 7 August
1944, did fail to return to his station and duty as afore-
said upon the expiration of said leave, and did remain
absent from the U. S. naval service, without leave from

proper authority, for a period of about thirteen days, at the expiration of which he was delivered at the Naval Training School, Hollidaysburg, Pennsylvania; the United States then being in a state of war.

CHARGE II

THEFT

SPECIFICATION

In that John W. Flemings, seaman second class, U. S. Naval Reserve, while so serving on active duty at the U. S. Naval Barracks, Naval Ammunition Depot, Earle, New Jersey, did, on or about 18 August 1944, in Trenton, New Jersey, feloniously take, steal, and carry away from the possession of one Ernest Bush, a civilian, a 1942 Chevrolet Sedan automobile of the value of about twelve hundred dollars (\$1200.00), said automobile being the property of the said Bush, and he, the said Flemings, did then and there appropriate the same to his own use; the United States then being in a state of war.

/s/ W. R. Munroe

W. R. MUNROE

Rear Admiral, U. S. Navy,
Commandant, Third Naval
District, and Task Force
Commander, Eastern Sea
Frontier.

NAVY YARD, NEW YORK, N. Y.

Monday, 2 October 1944.

The court met at 2:45 a. m.

Present: Rear Admiral Lamar R. Leahy, U.S. Navy, Retired, Captain James H. Tomb, U.S. Navy, Retired, Captain William K. Riddle, U.S. Navy, Retired, Commander Walter M. A. Wynne, U.S. Navy, Retired, Major Robert E. Adams, U.S. Marine Corps, Retired, Major Louis E. Fagan, Junior, U.S. Marine Corps, Retired, Major Arthur H. Turner, U.S. Marine Corps, Retired, Lieutenant Commander Townsend H. Boyer, U.S. Naval Reserve, Retired,

members, and

Lieutenant Commander Allen Blank, U.S. Naval Reserve, judge advocate.

The judge advocate introduced Joseph T. Gaynor, C/Y, USNR as reporter.

The accused entered and requested that Lieutenant George B. Foley; U.S. Naval Reserve act as his counsel. Lieutenant Foley took seat as counsel for the accused.

The judge advocate read the precept, copy prefixed marked "A".

The accused stated that he did not object to any member.

The judge advocate, each member, and the reporter were duly sworn.

The accused stated that he had received a copy of the charges and specifications preferred against him on 25 September 1944.

The judge advocate asked the accused if he had any objection to make to the charges and specifications.

The accused replied in the negative.

The court announced that it found the charges and specifications in due form and technically correct.

The accused stated that he was ready for trial.

No witnesses not otherwise connected with the trial were present.

The judge advocate read the letter containing the charges and specifications, original prefixed marked "B", and arraigned the accused as follows:

Q. John W. Flemings, seaman second class, U.S. Naval Reserve, you have heard the charges and specifications preferred against you; how say you to the specification of the first charge, guilty or not guilty?

A. Guilty, sir.

Q. To the first charge, guilty or not guilty?

A. Guilty, sir.

Q. To the specification of the second charge, guilty or not guilty?

A. Guilty, sir.

Q. To the second charge, guilty or not guilty?

A. Guilty, sir.

The accused was duly warned as to the effect of his pleas.

The accused persisted in his pleas.

THE PROSECUTION OFFERED NO EVIDENCE.

THE DEFENSE OFFERED NO EVIDENCE.

The accused did not desire to make a statement.

The judge advocate desired to make no opening argument.

The accused desired to make no argument and submitted his case to the court.

The trial was finished.

The judge advocate was directed to record the following findings:

The specification of the first charge proved by plea and that the accused, John W. Flemings, seaman second class, U.S. Naval Reserve, is of the first charge guilty.

The specification of the second charge proved by plea. And that the accused John W. Flemings, seaman second class, U.S. Naval Reserve is of the second charge guilty.

The accused did not wish to offer any matter in mitigation, extenuation or as to previous good character.

The judge advocate stated that he had no record of previous conviction, that the rate of pay of the accused is \$54 a month, that he was inducted on May 11, 1944 to serve for the duration of the war, and gave as his date of birth, January 9, 1926.

The court was cleared.

The judge advocate was recalled and directed to record the sentence of the court as follows:

The court therefore, sentences him, John W. Flemings, seaman second class, U.S. Naval Reserve, to be reduced to the rating of Apprentice Seaman, to be imprisoned for a period of three (3) years, then to be dishonorably discharged from the United States naval service and to suffer all the other accessories of said sentence as prescribed by Section 622 Naval Courts and Boards.

/s/ Lamar R. Leahy
 LAMAR R. LEAHY
 Rear Admiral, U. S. Navy,
 Retired, President

/s/ James H. Tomb
 JAMES H. TOMB
 Captain, U. S. Navy,
 Retired, Member

/s/ William K. Riddle
 WILLIAM K. RIDDLE
 Captain, U. S. Navy, Retired,
 Member

/s/ Walter M. A. Wynne
 WALTER M. A. WYNNE
 Commander, U. S. Navy,
 Retired, Member

/s/ Robert E. Adams
 ROBERT E. ADAMS
 Major, U. S. Marine Corps,
 Retired, Member

/s/ Louis E. Fagan, Junior
 LOUIS E. FAGAN, JUNIOR
 Major, U. S. Marine Corps,
 Retired, Member

/s/ Arthur H. Turner
 ARTHUR H. TURNER
 Major, U. S. Marine Corps,
 Retired, Member

/s/ Townsend H. Boyer
 TOWNSEND H. BOYER
 Lieutenant Commander, U. S.
 Naval Reserve, Retired,
 Member

/s/ Allen Blank
 ALLEN BLANK
 Lieutenant Commander, U. S.
 Naval Reserve, Judge
 Advocate

The court then at 2:50 p. m. adjourned until 10:00
 a. m. tomorrow, Tuesday, 3 October 1944.

/s/ Lamar R. Leahy
 LAMAR R. LEAHY
 Rear Admiral, U.S. Navy,
 Retired, President

/s/ ALLEN BLANK
 ALLEN BLANK
 Lieutenant Commander, U.S.
 Naval Reserve, Judge
 Advocate

ND3/A17-20/
DHq-15

HEADQUARTERS THIRD NAVAL DISTRICT
FEDERAL OFFICE BUILDING
90 CHURCH STREET
NEW YORK, N. Y.

924-94-27
(2909)

HPB:hl

Oct 7—1944

The proceedings, findings, and sentence of the general court martial in the foregoing case of John W. Flemings, seaman second class, U. S. Naval Reserve, are approved.

/s/ W. R. Munroe
W. R. MUNROE
Rear Admiral, U. S. Navy,
Commandant, Third Naval
District, and Task Force
Commander, Eastern
Sea Frontier

HEADQUARTERS THIRD NAVAL DISTRICT
FEDERAL OFFICE BUILDING
90 CHURCH STREET
NEW YORK, N. Y.

924-94-27
(2909)

HPB:hl

Oct 7—1944

DISTRICT GENERAL COURT MARTIAL
ORDER NO. 3875-14

1. On 2 October 1944, John W. Flemings, seaman second class, U. S. Naval Reserve, was tried by general court martial at the U. S. Navy Yard, New York, New York, by order of the Commandant, Third Naval District, and Task Force Commander, Eastern Sea Frontier, on the following charge and specifications:

CHARGE I:

ABSENCE FROM STATION AND DUTY AFTER
LEAVE HAD EXPIRED (one specification—from 7
August 1944-20 August 1944).

CHARGE II:

THEFT (one specification).

FINDINGS:

The court found the specifications of the charges proved by plea and that the accused was of the charge guilty.

SENTENCE:

The court sentenced the accused to be reduced to the rating of apprentice seaman, to be confined for a period of three (3) years months, then to be dishonorably discharged from the United States naval service, and to suffer all the other accessories of said sentence as prescribed by section 622, Naval Courts and Boards.

2. The convening authority this day placed the following remarks on the record in this case:

"The proceedings, findings, and sentence of the general court martial in the foregoing case of [Illegible].

The U. S. Naval Prison, Portsmouth, New Hampshire, is designated as the place of confinement."

/s/ W. R. Munroe
W. R. MUNROE
Rear Admiral, U. S. Navy,
Commandant, Third Naval
District, and Task Force
Commander, Eastern
Sea Frontier

IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NEW YORK

Civil Action No. 70-C-1267

JOHN W. FLEMINGS, PLAINTIFF

v.

JOHN N. CHAFFE, Secretary of the Navy, DEFENDANT

MOTION FOR SUMMARY JUDGMENT

Plaintiff, by his undersigned counsel, moves the Court as follows:

1. That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in plaintiff's favor for the relief demanded in the complaint on the ground that there is no genuine issue as to any material fact and that plaintiff is entitled to a judgment as a matter of law;

2. In the alternative, if summary judgment is not rendered in plaintiff's favor upon the whole case or for all the relief asked and a trial is necessary, that the Court, at the hearing on this motion, by examining the pleadings and the evidence before it and by interrogating counsel, ascertain what material facts are actually and in good faith controverted, and thereupon make an order specifying the facts that appear without substantial controversy and directing such further proceedings in the action as are just.

This motion is based upon all affidavits, pleadings, and exhibits filed herein.

WHEREFORE, plaintiff moves this Court enter a summary judgment granting plaintiff expungement of his dishonorable discharge and entitling him to a discharge on honorable conditions.

Respectfully submitted,

/s/ Michael Meltsner
MICHAEL MELTSNER
435 West 116 Street
New York, New York 10027
(212) 280-3867
Attorney for Plaintiff

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

No. 70/C/1267

JOHN W. FLEMINGS, PLAINTIFF

v.

JOHN N. CHAFFE, Secretary of the Navy, DEFENDANT

STATE OF NEW YORK)	
)	ss.:
STATE OF NEW YORK)	

AFFIDAVIT

MICHAEL MELTSNER, being duly sworn, deposes and says that:

I am a member of the Bar of the State of New York and affirm under penalty of perjury that the following is true, except where alleged on information and belief, and as to such statements I do believe them to be true. My office address is 435 West 116 Street, New York, New York 10027. On October 16, 1970 I was appointed by this Court to represent JOHN W. FLEMINGS, No. C7322, Box A, R.F.D. 3, Bellefonte, Pennsylvania 16823, in his above-styled action against the Secretary of the Navy. This affidavit is submitted in support of plaintiff's motion for summary judgment.

Subsequent to my appointment I corresponded with Mr. Flemings and with officials of the Office of the Judge Advocate General, and Board for Correction of Naval Records, Department of the Navy in order to obtain a full and accurate statement of the facts pertinent to Mr. Flemings' claim that he is entitled to a discharge under honorable conditions and to expunge-ment of a dishonorable discharge received from the United States Navy on or about October 23, 1946.

My investigation reveals that a copy of record of proceedings of the general court-martial held October 2, 1944 in the case of, then, Seaman 2nd Class, John W. Flemings, United States Naval Reserve, 924 24 27 as appended to the answer filed by defendant in this action on or about January 29, 1971 is a true and accurate record of said proceedings and apparently constitutes the only available transcript.

By letter of October 29, 1970, a copy of which is attached and incorporated herein as Exhibit A, I wrote Charles E. Curley, Executive Secretary, Department of the Navy, Board for Correction of Naval Records, requesting that the Board provide me with pertinent portions of Mr. Flemings' application for a change of his dishonorable discharge to a discharge under honorable conditions. Mr. Curley responded by letter of November 12, 1970 enclosing portions of Mr. Flemings' file. The letter and enclosures are attached and incorporated herein as Exhibit B. Exhibit B reveals, *inter alia*, that the Board for Correction of Naval Records denied plaintiff's application on the merits after considering his naval records, pertinent provisions of law together with additional material submitted in support of the application. Mr. Flemings was informed of the Board's action by letter of May 29, 1968. Mr. Flemings, therefore, has exhausted only the administrative remedy available to him to seek the relief he prays from this Court.

On January 9, 1971, at my direction an associate wrote the office of the Judge Advocate General, Department of the Navy, to inquire whether at the time of Mr. Flemings' 1944 conviction for absence without leave and theft and subsequent sentence to confinement, loss of privileges and pay, and discharge upon less than honorable conditions, a general court-martial convened pursuant to the authority conferred by the Secretary of the Navy was authorized to discharge a seaman under less than honorable circumstances for the offense of absence without leave. A copy of a reply to this letter from Captain K. A. Konopisos, JAGC U.S. Navy, is attached and incorporated herein as Exhibit C. Captain Konopisos confirms the understanding of plaintiff's counsel that a

dishonorable discharge was authorized for theft but not for two week absence without leave by the articles for the Government of the Navy and Naval Courts and Boards, the Navy Manual for Courts-Martial, in force at the time of plaintiff's court-martial. After diligent search of the available regulations of the Department of the Navy, counsel has been unable to verify the statements contained in Exhibit C by citation to a specific regulation or order. Nevertheless, the statements contained therein are consistent with counsel's research and counsel believes them to be true.

Dated: New York, New York—March 19, 1971.

/s/ Michael Meltsner
MICHAEL MELTSNER
435 West 116 Street
New York, New York 10027
(212) 280-3867
Attorney for Plaintiff

Subscribed and sworn to before me this 19 day of March, 1971.

/s/ Cecelia Schlesinger
CECELIA SCHLESINGER
Notary Public

EXHIBIT B

[SEAL]

DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
WASHINGTON, D. C. 20370

CEC:mas

12 November 1970

Michael Meltser, Esquire
Columbia University School of Law
435 West 116th Street
New York, New York 10027

Dear Mr. Meltser:

This is in reply to your letter of 29 October 1970 in the interest of Mr. John W. Flemings, who petitioned this Board by an application, DD 149, dated 23 February 1967, to change a dishonorable discharge dated 26 October 1946 to a discharge under honorable conditions.

Although Mr. Flemings did not file his application prior to 26 October 1961, or within three years after he discovered the alleged error or injustice, as required by 10 USC 1552, records pertaining to his naval service were assembled and reviewed. His application was denied and he was advised of the denial by the Board's letter of 29 May 1968.

Records pertaining to Mr. Flemings' service are not presently available. However, I am enclosing a summary of his case which was prepared from his records at the time the Board denied the application. You will note that the date of discharge was 23 October 1946. Enclosed also are copies of Mr. Flemings' application, DD 149, dated 23 February 1967, and of the Board's letter of 29 May 1968.

Mr. Flemings should have received a copy of the general court-martial after 2 October 1944. An additional copy

was furnished to him by the Office of the Judge Advocate General, probably in 1966. If he doesn't have a copy now and you desire a copy, you should send a letter request to the Office of the Judge Advocate General (20), Department of the Navy, Washington, D. C. 20370. There is a charge of approximately twelve cents a page, payable in advance. Upon receipt of a request that office will obtain the record and advise as to the cost.

Mr. Flemings may obtain a copy of his discharge certificate by addressing a letter request to National Personnel Records Center (Military Personnel Records), 9700 Page Boulevard, St. Louis, Missouri 63132.

I trust that the foregoing, together with the information contained in the enclosures, will be of assistance.

Sincerely yours,

/s/ Charles E. Curley
CHARLES E. CURLEY
Executive Secretary

Encls

BOARD FOR CORRECTION OF NAVAL RECORDS

NAME:

Docket No.: 993-67

FLEMINGS, John W., ex-AS, USNR, 924 94 27
 P. O. Box 9901
 Pittsburgh, Pennsylvania 15233

NATURE OF HEARING REQUESTED:

Oral. Does not desire to appear in person, but designates counsel (American Legion).

ACTION REQUESTED:

Change of DD to a General Discharge.

INJUSTICE ALLEGED:

"I wasn't allowed to say anything during my court-martial, other than what I was told to say, there was other evidence that never came out during my court-martial.

"I could not have taken any ones automobile, because I did not know how to drive, it was impossible for me to have drove any ones automobile from New Jersey to where I was pick up at." (sic)

SERVICE FACTORS:

Date of birth:	9 January 1926
Date of enlistment:	11 May 1944
Date of discharge:	23 October 1946
Type of discharge:	DD
Highest rating	S2c
GCT:	33
Education:	10 years
Prior service:	None

DISCIPLINARY RECORD:

- 7 Aug 1944—AOL this date from 0700
- 20 Aug 1944—Apprehended by civil authorities at Boalsburg, Pa., Route 322, College Township, Center County, at 9:15, 18 August 1944 driving 1941 Chev. Sedan, stolen from Trenton, N.J., with stolen Penna. License 940F6. Delivered at NT Sch (Radio), Hollidaysburg, Pa., at 1500, 20 August 1944.

- GCM 2 Oct 1944— (1) AOL from 7 August 1944 to 20 August 1944, and Reduction to AS, confinement for 3 years, then to be dishonorably discharged from the service and to suffer all accessories of said sentence.
- (2) Theft
- 7 Oct 1944—CA approved proceedings, findings and sentence of GCM.
- 24 Oct 1944—Transferred to Naval Prison at Portsmouth, New Hampshire for confinement.
- CM 11 Jul 1945—Causing disturbance, lying, insolence to sentry, direct disobedience 5 days on B&W; 5 days loss of good time.
- CM 24 Jul 1945—Direct disobedience of orders; refusing to work, insolence 2 days on B&W.
- CM 17 Aug 1945—Disobedience of orders (inciting a riot—insolence) 5 days B&W in isolation, including equivalent loss of good time.
- CM 4 Mar 1946—(1) Leaving work detail without permission; 2 days on B&W, loss of equivalent good time.
- (2) Caught going to cell block tunnel, should have been in Annex alley
- CM 18 Apr 1946—Fighting and inciting a riot 2 days on B&W.
- CM 13 May 1946—Dirty clothes hidden in locker; contraband picture magazine; 2 books with library stamps but not checked out by anyone. 2 days on B&W; third class 2 weeks.
- CM 6 Jun 1946—Contraband in his possession, (1) extra pair of work grays, and (1) magazine 3rd class status.
- CM 22 Jun 1946—Threatening the tier captain, using obscene language toward him. Direct disobedience of orders 5 days on B&W, including equivalent loss of good time.

- CM 14 Aug 1946—Using obscene language, insolence, skylarking and direct disobedience of orders 2 days on B&W and equivalent loss of good time.
- CM 27 Aug 1946—Laughing and sitting down during 1930 count 1 week isolation.
- CM 30 Sep 1946—Hand on sentry. Disrespect to sentry. Bucking the chow line. Insubordination. Direct disobedience of orders. Refusing to give up work card "Thirty (30) days good time." [loss of].
- 23 Oct 1946—CO returned 30 days good time this date, and discharged with a DD at USNDB, Portsmouth, New Hampshire.

COMMENTS ON GCM:

On 2 October 1944, Petitioner was tried by GCM at the Navy Yard, New York, for (1) absence over leave for a period of thirteen days from 7 August 1944, and from the U. S. Naval Barracks, Naval Ammunition Depot, Earle, New Jersey, at the expiration of which he was delivered, at the Naval Training School, Hollidaysburg, Pennsylvania; the U. S. then being in a state of war; and (2) theft, in that on 18 August 1944, in Trenton, New Jersey, he did feloniously take, steal and carry away from the possession of one Ernest Bush, a civilian, a 1942 Chevrolet Sedan of the value of \$1,200 said auto being the property of the said Bush, and he (Petitioner) did then and there appropriate the same to his own use; the U.S. then being in a state of war. Petitioner had counsel, and pleaded guilty to all charges and specifications. He did not desire to make a statement and the court found him guilty upon his pleas. He did not wish to offer matter in mitigation, extenuation or as to previous good character, and the court thereupon fixed his punishment at reduction to AS, confinement for 3 years, a DD, and to suffer the accessories of said sentence.

CONFINEMENT:

While Petitioner was in confinement he was seen by a psychiatrist on at least four occasions. On 10 July 1946,

the psychiatrist reported that Petitioner was considered normal, and that there was no evidence of any psychopathic or neuropathic traits. Further, that Petitioner was not considered good material for restoration. Petitioner's infractions while in confinement were commented on, and his conduct was considered unsatisfactory. The local clemency board did not recommend either clemency or restoration, and the CO concurred.

ADDITIONAL:

Petitioner is presently in the State Correctional Institution, at Pittsburgh, Pennsylvania, where he was admitted in early 1964. His records also reflect that he was in the U. S. Penitentiary at Atlanta, Georgia, in 1954, serving a sentence of 34 months for interstate transportation of a stolen motor vehicle.

CONCLUSION:

There is no evidence of probable error or injustice in this case. He was convicted of an infamous crime while in service, and his confinement was marked with numerous infractions. His punishment was not too severe for his offenses, and he was not resterable material in view of the type of his offense, as well as his prison conduct.

RECOMMENDATION:

Deny.

Respectfully submitted,

/s/ Oscar M. Fair, Jr.
OSCAR M. FAIR, JR.



[SEAL]

DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
WASHINGTON, D. C. 20370

CEC:dls

29 May 1968

Mr. John W. Flemings
P. O. Box 9901
Pittsburgh, Pennsylvania 15233

Mr. Flemings:

My dear

Reference is made to your application for correction of your naval record under the provisions of Title 10 U.S.C. 1552.

Under long established rules followed by the courts and administrative boards, a presumption of regularity attaches to official records. Consonant therewith, the burden of proof is on a Petitioner to show by documentary evidence that an error has occurred or an injustice has been suffered.

Your allegations of error and injustice have been reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, naval records, and pertinent statutes, regulations and policies.

After careful and conscientious consideration of the entire record, the Board determined that insufficient evidence has been presented to indicate probable material error or injustice. Accordingly, your application has been denied.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are

privileged to submit new and material evidence for consideration. As explained above, however, the burden is on you to show that an error or injustice has occurred.

Sincerely yours,

CHARLES E. CURLEY
Executive Secretary

Copy to: American Legion

By direction of the Chairman

EXHIBIT C

[SEAL]

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D. C. 20370

In Reply Refer to
JAG:202.2:CAC:dat
931

Feb 1 1971

Mr. Arthur T. Cambouris
600 West 111th Street
New York, New York 10025

Dear Mr. Cambouris:

Your letter of 9 January 1971 addressed to the Judge Advocate General of the Navy has been referred to me for reply.

Before answering your specific questions, it should be noted that prior to the enactment by Congress of the Uniform Code of Military Justice in 1950, each service operated under its own statute. Army courts-martial were governed by the Articles of War (A.W.), while the Navy proceeded under the Articles for the Government of the Navy (AGN). These laws governing the administration of justice in the Navy were codified in section 1200, title 34, of the United States Code. The Navy equivalent to the present Manual for Courts-Martial was entitled Naval Courts and Boards whereas the Army operated pursuant to their Manual for Courts-Martial. Executive Order No. 9267 of 9 November 1942, referred to in your second question, was applicable only to the Army, since its suspension provisions were limited to the 1928 Army Manual for Courts-Martial. Your inquiry regarding this Executive Order should, therefore, be referred to the Judge Advocate General of the Army for a definitive answer.

Your other questions are more easily resolved. The maximum punishment imposable by a Navy general court-martial upon an enlisted man for a two week unauthorized absence in October 1944, was confinement for six months plus an additional period of confinement equal to the period of absence, loss of all pay and allowance during a like period, reduction to the lowest enlisted pay grade, and a bad conduct discharge.

The maximum punishment imposable by a Navy general court-martial in 1944 for auto theft depended upon the punitive article under which the accused was tried. Assuming the vehicle was valued in excess of \$100, the maximum punishment for theft by an officer included dismissal, confinement for four years and total forfeiture of pay and allowances, while the maximum for an enlisted man was a dishonorable discharge, four years' confinement, total forfeitures and reduction to the lowest enlisted pay grade. If, on the other hand, the accused was charged with unauthorized use of a vehicle not the property of the United States, the maximum punishments were; for an officer, dismissal, three years' confinement and total forfeitures, and for an enlisted man, dishonorable discharge, three years' confinement, total forfeitures and reduction to the lowest enlisted pay grade.

I hope this information answers your inquiries.

Sincerely,

/s/ K. A. Konopisos
K. A. KONOPISOS
Captain, JAGC, U. S. Navy

JDP:BFS:eh

File No. 702098

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. 70 C 1267

UNITED STATES OF AMERICA, ex rel.

JOHN W. FLEMINGS, PLAINTIFF

against

HON. JOHN H. CHAFEE,

Secretary of the Navy, DEFENDANT

NOTICE OF CROSS-MOTION AND MOTION TO DISMISS

SIR:

PLEASE TAKE NOTICE that upon the annexed affidavit of Bruce F. Smith, Assistant United States Attorney, Eastern District of New York, sworn to the 21st day of April, 1971 and upon the plaintiff's motion papers for summary judgment returnable April 27, 1971, and upon all the pleadings and procedures heretofore had herein, the undersigned will cross move for an order pursuant to Rule 12(b) of the Federal Rules of Civil Procedure dismissing the plaintiff's complaint for lack of jurisdiction and for failure to state a claim upon which relief can be granted and an order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting summary judgment in favor of the defendant and against the plaintiff upon the ground that there is no genuine issue of any material fact as to defendant's motion for summary judgment and that the defendant is entitled to a judgment as a matter of law and for such other and further relief as to this Court may seem just and proper.

Dated: Brooklyn, New York—April 21, 1971

Yours, etc.,

EDWARD R. NEAHER
United States Attorney
Eastern District of
New York
Attorney for Defendant
United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

By: /s/ Bruce F. Smith
BRUCE F. SMITH
Assistant U. S. Attorney

To:

MICHAEL C. MELTSNER, ESQ.
Attorney for Plaintiff
Columbia University School of Law
435 West 116th Street
New York, New York 10027

JDP:BFS:eh

File No. 702098

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. 70 C 1267

UNITED STATES OF AMERICA, ex rel.
JOHN W. FLEMINGS, PLAINTIFF

against

HON. JOHN H. CHAFEE,
Secretary of the Navy, DEFENDANT

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF KINGS) ss.:
EASTERN DISTRICT OF NEW YORK)

BRUCE F. SMITH, being duly sworn, deposes and says:

He is an Assistant United States Attorney for the Eastern District of New York, and as such is familiar with and in charge of the above-captioned action.

This affidavit is submitted in support of defendant's motion to dismiss the complaint herein pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure and defendant's motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Plaintiff was convicted by a general court-martial on October 2, 1944, of the crimes of being absent without leave and felonious theft of an automobile. He was sentenced to three years confinement, reduction in rating to apprentice seaman, and a dishonorable discharge. These proceedings were reviewed and approved on October 7, 1944. Plaintiff made no attempt to appeal this conviction.

On February 23, 1967, plaintiff petitioned the Board for Correction of Naval Records to have his discharge change to honorable on the basis that the court-martial failed to consider certain evidence. This petition was denied on May 29, 1968. Plaintiff has made no further applications to the Board for Correction of Naval Records or to the Judge Advocate General for the correction of his military records.

Plaintiff filed this suit and counsel was appointed in October of 1970.

WHEREFORE, your deponent prays for an order pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, dismissing plaintiff's complaint and an order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting summary judgment for defendant and against plaintiff and for such other and further relief as to this Court may seem just and proper.

Dated: Brooklyn, New York—April 21, 1971

/s/ Bruce F. Smith
BRUCE F. SMITH
Assistant U. S. Attorney

SWORN to before me this 21st day of April, 1971.

/s/ Lloyd H. Baker
LLOYD H. BAKER
Notary Public

IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NEW YORK

Civil Action No. 70-C-1267

JOHN W. FLEMINGS, PLAINTIFF

v.

JOHN N. CHAFEE,
Secretary of the Navy, DEFENDANT

STATEMENT OF MATERIAL FACTS

Pursuant to Rule 9(g) of the General Rules of this Court, the following is the plaintiff's statement of material facts as to which there is no dispute:

1. In August, 1944 the plaintiff was an enlisted man in the United States Navy, stationed at Earle, New Jersey.
2. While he was absent from his station, the plaintiff was arrested in August 1944 for auto theft.
3. The stolen auto was a civilian car (Chevrolet sedan), stolen from one Ernest Bush, a civilian, who was in no way connected with the military.
4. The car was stolen in Trenton, New Jersey, and was not taken from a military base.
5. Plaintiff was apprehended by two Pennsylvania state troopers in Hollidaysburg, Pennsylvania, in an area not under military control.
6. Plaintiff was delivered by civil authorities to Naval personnel and eventually transported to Harts Island, New York.
7. Plaintiff was charged, tried, convicted and sentenced as more fully appears in the record of proceedings appended to defendant's answer.
8. The civilian courts of both New Jersey and Pennsylvania were open at the time of plaintiff's arrest, and auto theft was a crime cognizable in the civilian courts of those states.

9. In February, 1967, plaintiff petitioned the Board for Correction of Naval Records to change his dishonorable discharge to one issued under honorable conditions.

10. On May 29, 1968 the Board for Correction of Naval Records denied plaintiff's request, as more fully appears in Exhibit B attached to annexed affidavit of counsel for plaintiff.

Respectfully submitted,

/s/ Michael Meltsner
MICHAEL MELTSNER
435 West 116 Street
New York, New York 10027
(212) 280-3867
Attorney for Plaintiff

JDP:BFS:eh

File No. 702098

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. 70 C 1267

UNITED STATES OF AMERICA ex rel.
JOHN W. FLEMINGS, PLAINTIFF

against

HON. JOHN H. CHAFEE,
Secretary of the Navy, DEFENDANT

STATEMENT OF MATERIAL FACTS

Pursuant to Rule 9(g) of the General Rules For the Southern and Eastern Districts of New York, defendant presents, in support of his motion for summary judgment, a statement of material facts as to which he contends there is no genuine issue to be tried:

1. In August, 1944, plaintiff was an enlisted man in the United States Naval Reserve, stationed at Earle, New Jersey.
2. While he was absent without leave from his station, plaintiff was arrested by civilian authorities for auto theft.
3. The stolen automobile was owned by a civilian, one Ernest Bush.
4. The car was stolen in Trenton, New Jersey.
5. Plaintiff was turned over to naval authorities and was transported to Harts Island, New York.
6. Plaintiff was charged with being absent without leave and auto theft and was tried, convicted and sentenced in 1944, as more fully appears in the Record of Proceedings annexed to defendant's answer.
7. Plaintiff took no appeal from his conviction.
8. In February, 1967, plaintiff petitioned the Board for Correction of Naval Records to Change his dishonor-

able discharge to one issued under honorable conditions on the basis of the court martial's failure to consider certain evidence.

9. On May 29, 1968, the Board for Correction of Naval Records denied plaintiff's request, granting him leave to resubmit his petition should new information become available.

10. On June 2, 1969, the Supreme Court rendered its decision in *O'Callahan v. Parker*, 395 U.S. 258 (1969).

Respectfully submitted,

/s/ Bruce F. Smith
BRUCE F. SMITH
Assistant U. S. Attorney
Of Counsel for Defendant

JDP:BFS:eh

File No. 702098

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. 70 C 1267

UNITED STATES OF AMERICA ex rel.
JOHN W. FLEMINGS, PLAINTIFF

against

HON. JOHN H. CHAFEE,
Secretary of the Navy, DEFENDANT

STATEMENT OF MATERIAL FACTS

Pursuant to Rule 9(g) of the General Rules For the Southern and Eastern Districts of New York, defendant presents, in opposition to plaintiff's motion for summary judgment, a statement of material facts as to which it is contended there exists a material issue to be tried:

1. Whether Ernest Bush was in no way connected with the military.
2. Whether the stolen car was taken from a military base, and was in no way involved with a military duty.
3. Whether plaintiff was in uniform at the time of the alleged theft or his subsequent apprehension.

Respectfully submitted,

/s/ Bruce F. Smith
BRUCE F. SMITH
Assistant U. S. Attorney
Of Counsel for Defendant

EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. 70 C 1267

UNITED STATES OF AMERICA ex rel.
JOHN W. FLEMINGS, PLAINTIFF

against

HON. JOHN H. CHAFEE,
Secretary of the Navy, DEFENDANT

AFFIDAVIT OF ANDREW COOPER

State of New York)
) ss.:
County of New York)

ANDREW COOPER, being duly sworn, deposes and says that:

I am a third-year student at Columbia University School of Law, 435 West 116th Street, New York. I reside at 205 West 107th Street, New York. I am presently a student assistant Professor Michael Meltsner, who represents plaintiff John W. Flemings in the above-styled cause.

On Saturday, April 24, 1971, at the direction of Professor Meltsner, I telephoned Mr. Ernest Bush, 315 Garfield Avenue, Trenton, New Jersey (609-392-7357). Mr. Bush stated to me that he was the owner of a 1942 Chevrolet sedan, which was stolen on or about August 17, 1944, while parked on Calahoune Street in the city of Trenton. According to Mr. Bush, the automobile was stolen at approximately 11 o'clock a.m. after the vehicle had been parked on a city street to allow Mr. Bush to run a personal errand. Mr. Bush stated to me that the car was not taken from a military base, and was not employed by him for any military purpose. Although Mr. Bush was a member of the United States Signal

Corps at the time, he resided off-based and received no compensation whatsoever from the military for use of the vehicle. Mr. Bush stated that he did not observe the theft of the vehicle.

Dated: New York, New York—April 26, 1971

/s/ Andrew Cooper
ANDREW COOPER

Subscribed and sworn to before me this 26 day of April, 1971.

/s/ Celeia Schlesinger
Notary Public

IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NEW YORK

Civil Action No. 70-C-1267

JOHN W. FLEMINGS, PLAINTIFF

v.

JOHN H. CHAFEE,
Secretary of the Navy, DEFENDANT

ORDER

Plaintiff's motion for summary judgment and defendant's motion to dismiss and cross-motion for summary judgment having been brought on for hearing on April 27, 1971, and the same having been duly heard and submitted to the Hon. Jack B. Weinstein, by Bruce F. Smith, Assistant United States Attorney of counsel for defendant, and Michael Meltner, Esq. for plaintiff, it is noted that plaintiff has agreed to make application in accordance with prescribed procedure to the Board for Correction of Naval Records, pursuant to 10 U.S.C. § 1552, and to the Judge Advocate General, United States Navy, pursuant to 10 U.S.C. § 869, for correction of his military records on the ground that the court-martial that convicted him in 1944 lacked jurisdiction over the alleged auto theft of which he was accused, and it is

ORDERED, that this Court retains jurisdiction over this case pending plaintiff's applications to the Judge Advocate General, United States Navy, and the Board for Correction of Naval Records, and final decision rendered thereon. Should final decision on either or both such applications not be made within 60 days from the date of submission of such applications, this Court will proceed to a determination of the motions submitted.

Dated: New York, New York—April 30, 1971.

SO ORDERED:

/s/ Jack B. Weinstein
JACK B. WEINSTEIN
U.S.D.J.

IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NEW YORK

Civil Action No. 70/C/1267

JOHN W. FLEMINGS, PLAINTIFF

v.

JOHN H. CHAFEE,
Secretary of the Navy, DEFENDANT

STATE OF PENNSYLVANIA)
) ss.:
COUNTY OF CENTRE)

AFFIDAVIT OF JOHN W. FLEMINGS

JOHN W. FLEMINGS, having been duly sworn, deposes and says:

I am the plaintiff in the above-styled cause. I am presently incarcerated at the State Correctional Institution at Rockview, Box A, RFD 3, Bellefonte, Pennsylvania 16823. I am over 21 years of age. On or about August 4, 1944, I was granted a 72 hour pass permitting me to leave my station at the Earle Ammunition Depot in New Jersey. My leave expired on the 7th of August. When I left the Depot on August 4 I was not wearing my Navy uniform and I did not wear a uniform again until after I was arrested by Pennsylvania state troopers near Hollidaysburg, Pennsylvania on or about August 17th. The car in which I was arrested and which I was convicted of stealing was not a military vehicle. It certainly had no military markings on it of any kind. I was told by the Navy at my court-martial that the car was stolen from a civilian in Trenton, New Jersey.

/s/ John W. Flemings
JOHN W. FLEMINGS

Sworn to before me this 10 day of May 1971

/s/ Mahlon E. King
Notary Public

Mahlon E. King, Notary Public
Benner Twp., Centre County, Pa.

My Commission expires April 22, 1972

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

No. 70/C/1267

JOHN W. FLEMINGS, PLAINTIFF

v.

JOHN H. CHAFEE,
Secretary of the Navy, DEFENDANT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

AFFIDAVIT OF COUNSEL FOR PLAINTIFF

MICHAEL MELTSNER, being duly sworn, deposes and says that I am counsel for plaintiff in the above-styled cause and I make this affidavit to bring to this Court's attention events which have occurred subsequent to the Court's order of April 30, 1971.

In accordance with prescribed agency procedures, by letters dated May 10, 1971, I renewed plaintiff's application to the Board for Correction of Naval Records that he be issued an honorable discharge and applied to the Judge Advocate General of the Department of the Navy for similar relief pursuant to Article 69, Uniform Code of Military Justice. (Copies of my letters of May 10, 1971 are attached herewith as Exhibits A and B, respectively.)

By letter of May 21, 1971 from Captain K. A. Konopis, Deputy Assistant Judge Advocate General, I am informed that the Judge Advocate General has determined that no action to modify plaintiff's sentence is warranted. Attached to Captain Konopis' letter is a formal "Examination Pursuant to Article 69 UCMJ . . ." stating reasons for the determination of the Judge Advocate General. (Copies of the letter and "Examination Pursuant to Article 69 UCMJ . . ." are attached herewith as Exhibit C.)

By letter of May 24, 1971, Charles E. Curley, Executive Secretary, Department of the Navy, Board for Correction of Naval Records, has informed me that the Board has denied plaintiff's request for reconsideration. (A copy of Mr. Curley's letter is attached herewith as Exhibit D.)

Plaintiff has now fully exhausted available administrative remedies. Pursuant to the order of April 30, 1971, the Court now appropriately proceeds "to a determination of the motions submitted" on April 27, 1971.

/s/ Michael Meltsner
MICHAEL MELTSNER
Attorney for Plaintiff
435 West 116 Street
New York, N.Y. 10027

Sworn to before me this 1st day of June, 1971.

/s/ Phyllis M. Dzierzynski

EXHIBIT A

May 10, 1971

Charles E. Curley
Executive Secretary
Board for Correction of Naval Records
Department of the Navy
Washington, D.C. 20370

Dear Mr. Curley:

On October 29, 1970, I wrote to inform you that I had been appointed by Jack B. Weinstein, United States District Judge for the Eastern District of New York, to serve as counsel for Mr. John W. Flemings in an action (No. 70/C/1267) that Mr. Flemings has filed to compel the Secretary of the Navy to correct his dishonorable discharge. In this action the Secretary is represented by Assistant United States Attorney Bruce F. Smith.

On April 27, 1971, Judge Weinstein heard arguments from counsel on a motion for summary judgment, filed by Mr. Flemings, and a cross-motion for summary judgment and a motion to dismiss filed by the Secretary. In sum, these motions ask the Court to decide whether the court-martial which convicted plaintiff of theft in 1944 and sentenced him to a dishonorable discharge, as well as other penalties, was without jurisdiction to do so.

At the suggestion of the Assistant United States Attorney that administrative remedies had not been exhausted, Judge Weinstein agreed to hold the motions pending before him under advisement for 60 days in order to permit the Board for Correction of Naval Records, pursuant to 10 USC § 1552, and the Judge Advocate General, pursuant to 10 USC § 869, to re-examine plaintiff's claim that he is entitled to a correction of his discharge status.

In order that you may promptly consider plaintiff's claim in this regard, in addition to your own file (docket number 193-67) I herewith submit the following documents for your consideration:

(1) My affidavit of March 19, 1971 and exhibits attached;

(2) Plaintiff's memorandum in support of motion for summary judgment;

(3) My affidavit in opposition to cross-motion and motion to dismiss and exhibits attached.

In my judgment, the Board should direct itself, *inter alia*, to the following questions.

1. Whether the Supreme Court's decision in *O'Callahan v. Parker*, 395, U.S. 258 is retroactive in its effect.

2. Whether, if *O'Callahan*, *supra*, is retroactive, it entitles plaintiff to an honorable discharge.

I also enclose form 22-R009 and a waiver of notice form. The papers submitted present plaintiff's position on these questions. If I can be of further assistance to you in supplying you with information pertinent to this application please do not hesitate to contact me.

Sincerely,

MICHAEL MELTSNER
Associate Professor of Law

MM/sg

enclosures

cc: Bruce F. Smith, Esq.

EXHIBIT B

May 10, 1971

Office of the Judge Advocate General, Navy
Department of Defense
Washington, D.C. 20370

Gentlemen:

On October 29, 1970, I was appointed by Jack B. Weinstein, United States District Judge for the Eastern District of New York, to serve as counsel for Mr. John W. Flemings in an action (No. 70/C/1267) that Mr. Flemings has filed to compel the Secretary of the Navy to correct his dishonorable discharge. In this action, the Secretary is represented by Assistant United States Attorney Bruce F. Smith.

On April 27, 1971, Judge Weinstein heard arguments from counsel on a motion for summary judgment filed by Mr. Flemings, and a cross-motion for summary judgment and a motion to dismiss filed by the Secretary. In sum, these motions ask the Court to decide whether the court-martial which convicted plaintiff of theft in 1944 and sentenced him to a dishonorable discharge, as well as other penalties, was without jurisdiction to do so.

At the suggestion of the Assistant United States Attorney that administrative remedies had not been exhausted Judge Weinstein agreed to hold the motions pending before him under advisement for 60 days in order to permit the Board for Correction of Naval Records, pursuant to 10 USC § 1552, and the Judge Advocate General, pursuant to 10 USC § 869, to re-examine plaintiff's claim that he is entitled to a correction of his discharge status.

In order that you may promptly consider plaintiff's claim in this regard, in addition to the file of the Board for Correction of Naval Records on this matter (docket number 193-67) I herewith submit the following documents for your consideration:

(1) My affidavit of March 19, 1971, and exhibits attached;

(2) Plaintiff's memorandum in support of motion for summary judgment;

(3) My affidavit in opposition to cross-motion and motion to dismiss and exhibits attached.

In my judgment your office should direct itself, *inter alia*, to the following questions:

1. Whether the Supreme Court's decision in *O'Callahan v. Parker*, 395, U.S. 258 is retroactive in its effect.

2. Whether, if *O'Callahan, supra*, is retroactive, it entitles plaintiff to an honorable discharge.

I also enclose form 22-R009. The papers submitted present plaintiff's position on these questions. If I can be of further assistance to you in supplying you with information pertinent to this application please do not hesitate to contact me.

Sincerely,

/s/ MICHAEL MELTSNER
Associate Professor of Law

MM/sg

enclosures

cc: Bruce F. Smith, Esq.

EXHIBIT C

[SEAL]

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D. C. 20370

Michael Meltsner, Esq.
Associate Professor of Law
Columbia University
School of Law
435 West 116th Street
New York, NY 10027

In Reply Refer to
JAG:203:LGB:nb
Ser: 4261
21 May 1971

Re: General court-martial of Seaman Second Class
John W. FLEMINGS, U. S. Naval Reserve, 924 24
27; sentence adjudged 2 October 1944

Dear Mr. Meltsner:

In reference to your letter of 10 May 1971, you are advised that the record of trial in subject case has been examined in this office pursuant to Article 69, Uniform Code of Military Justice. As indicated by the enclosed copy of the Denial of Relief by the Judge Advocate General and for the reasons stated therein, no action to modify the findings or sentence is warranted.

Sincerely,

/s/ K. A. Konopisos
K. A. KONOPISOS
Captain, JAGC, U. S. Navy
Deputy Assistant Judge
Advocate General
(Military Justice)

Enclosure

Copy to (w/encl):

Accused

COMTHREE&TF COM EASTSEAFRON

Service record

Record of Trial

BUPERS

EXHIBIT C

JAG:203:LGB:nb

IN THE OFFICE OF THE
JUDGE ADVOCATE GENERAL OF THE NAVY

UNITED STATES

v.

JOHN W. FLEMINGS

924 24 27

Seaman Second Class

U. S. Naval Reserve

Examination pursuant to Article 69, UCMJ, of general court-martial convened by Commandant, Third Naval District, and Task Force Commander, Eastern Sea Frontier at U. S. Navy Yard, New York, New York

Sentence adjudged 2 October 1944

20 May 1971

In accordance with his pleas, the Petitioner was found guilty by general court-martial at the United States Navy Yard, New York on October 2, 1944. He was charged with: Charge I: Unauthorized absence for a period of about thirteen days, and Charge II: Theft of an automobile. He entered pleas of guilty to both charges and was so found by the court. He was sentenced to be reduced to the rate of Seaman Apprentice, to be confined for a period of three years, and to be dishonorably discharged from the naval service. The Convening Authority, on October 7, 1944, approved the findings and sentence.

The Petitioner, through his attorney has raised the issue of whether the Supreme Court's decision in *O'Callahan v. Parker*, 395, U. S. 258, is retroactive in its effect; and whether if *O'Callahan, supra*, is retroactive, does it entitle the Petitioner to an honorable discharge?

The United States Court of Military Appeals has held

in several recent cases that *O'Callahan, supra*, applies prospectively only. It affects those cases not final as of June 1969, but not those on which appellate review was complete as of that date.

"The effect of the *O'Callahan* decision may be viewed as extending to members of the armed forces in some circumstances constitutional rights of grand jury indictment and trial by petit jury. Such a view conduces to only a prospective application of the extension. *Gosa v Mayden*, 305 F Supp 486 (sic) (ND Fla) (1969). Other possible justifications for prospective effect are the thoughts that *O'Callahan* did not rule on the existence of subject-matter jurisdiction, that it limited the *exercise* of such jurisdiction, and that this limitation is functional only. *United States v King*, ACM 20361, July 30, 1969."

The court further stated:

"As in many of the cases affected, the accused in the case *sub judice* pleaded guilty. How could it be argued that he has been subjected to an unfair trial on the issue of his guilt? Second, the armed forces undoubtedly relied on the absence of any earlier indication that anything other than status limited the authority of Congress to make crimes punishable by court-martial. Finally, when a holding of general retroactivity would place countless conviction for serious crimes in jeopardy and would often result not in a retrial by a civilian court but an avoidance of further trial, we have no difficulty in concluding that the disruption of the administration of justice would be substantial.

"The petition is denied." *Mercer v. Dillon*, 19 USCMA 264, 41 CMR 264 (1970).

In the case of *Hooper v. Laird*, 19 USCMA 329, 41 CMR 329 (1970), the Petitioner applied for writ of coram nobis to the United States Court of Military Appeals, and the substance of his request was a request for retroactive application of *O'Callahan, supra*.

"As in *Mercer v. Dillon*, 19 USCMA 264, 41 CMR 264 (1970), the Court is not unanimous in viewing the consideration of extraordinary relief in this instance as being in aid of its jurisdiction, as section 1651 of Title 28, United States Code, requires, but the majority position on that issue has resulted in our addressing the petition on its merits.

"For the reasons outlined in *Mercer*, we held that the decision in *O'Callahan* applied only to those cases still subject to direct review by this Court on June 2, 1969, the date of the *O'Callahan* opinion. The *Mercer* decision controls our decision in this case. Accordingly, the petition is denied."

The question of retroactivity has also been ruled on by various federal courts. See: *Conn v. Hayden*, 305 F. Supp. 1186 (ND FLA) (1969), and *Thompson v. Parker*, 308 F. Supp. 904 (DC PA) (1970), the courts generally holding that retroactivity is not to be applied.

In light of the foregoing, examination of this case pursuant to Article 69, UCMJ, discloses no error prejudicial to the substantial rights of the accused or other grounds for relief under Article 69. Accordingly, no action to vacate or modify the findings or sentence as approved is warranted.

K. A. KONOPISOS
By direction

Copy to:

Accused
COMTHREE&TFCOM EASTSEAFRON
Service record
BUPERS

Michael Meltsner, Esq.

Certified to be a true copy:

/s/ L. G. Bohlen
L. G. BOHLEN
LTCOL, USMC

EXHIBIT D

[SEAL]

DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
WASHINGTON, D. C. 20370

24 May 1971

Michael Meltsner, Esquire
Columbia University School of Law
435 West 116th Street
New York, New York 10027

Dear Mr. Meltsner:

This will acknowledge receipt of your letter of 10 May 1971 by which you forwarded an application, DD 149, dated 9 May 1971, and related documents, on behalf of Mr. John W. Flemings.

By his application Mr. Flemings requests, in effect, that a dishonorable discharge of 23 October 1946 be changed to a discharge under honorable conditions, and contends that the court-martial which sentenced him to be dishonorably discharged was without jurisdiction. In support of his contention he cites the case of O'Callahan v. Parker, 395 U.S. 258.

The Board's records show that by a previous application, DD 149, dated 23 February 1967, Mr. Flemings requested that his discharge be changed. He did not submit his request before 26 October 1961, as required by 10 USC 1552. He had been previously advised by the Board's letter of 15 February 1967 that the Board is not empowered to disturb the findings of a court-martial nor to predicate relief on alleged legal error in a court-martial record.

Records pertaining to Mr. Flemings' naval service were assembled and reviewed. They did not disclose that he petitioned the Judge Advocate General to grant a new trial or for other relief pursuant to the authority contained under Section 12 of the Act of May 5, 1950, 50 U.S.C. 70. The records did disclose that he was tried

by general court-martial on 2 October 1944 and convicted of Charge I, Absence from Station and Duty after Leave had Expired, Charge II, Theft, and the specifications thereunder. His approved sentence provided, *inter alia*, that he be confined for a period of three years and that he be dishonorably discharged. During the period of his confinement he was punished because of eleven disciplinary infractions.

The Board's review was limited to determining whether or not the court-martial sentence, as approved, was so severe as to constitute an injustice. The Board, not being empowered to determine whether or not court-martial findings are legal, did not make a determination as to the validity of the court-martial findings. The Board determined that insufficient evidence had been presented to indicate the existence of probable error or injustice and denied the application. Mr. Flemings was advised of the denial by the Board's letter of 29 May 1968.

The Board for Correction of Naval Records is established pursuant to the authority contained in 10 USC 1552, and enables the Secretary of the Navy, acting through the Board, to correct an error or remove an injustice in or from a military record. This legislation relieved the Congress of the burden of considering private relief bills theretofore introduced to accomplish such changes. A private relief bill did not have the legal efficacy of disturbing the conclusiveness of a court-martial conviction. Since a private relief bill did not address the conclusiveness of a court judgment, the Board is not deemed or considered to have any greater relief power than its historical antecedent.

By statute, Congress has specifically provided that court-martial proceedings, findings, and sentences "are final and conclusive" and "are binding upon all departments, courts, agencies, and officers of the United States," 10 USC 876. In consonance with this statutory prescription, and relying on an opinion of the Attorney General, 40 Op. Atty. Gen., 504 (1947), the Judge Advocate General

of the Navy has consistently held that the Board for Correction of Naval Records does not have the authority to infringe on the finality and conclusiveness of the proceedings, findings, and sentence of a court-martial. Accordingly, the Judge Advocate General has held that, in determining whether error or injustice exists, the Board may not predicate its determination upon alleged irregularities of law or procedure appearing in a court-martial record.

In view of the foregoing, Mr. Flemings' application of 9 May 1971 is construed as a request for reconsideration of the Board's previous denial. No new and relevant evidence having been submitted, and the Board not being empowered to determine the legality of the court-martial findings, the request is denied.

Sincerely yours,

/s/ Charles E. Curley
CHARLES E. CURLEY
Executive Secretary

SUPREME COURT OF THE UNITED STATES

No. 71-1398

JOHN W. WARNER,
Secretary of the Navy, DEFENDANT

v.

JOHN W. FLEMINGS

ORDER ALLOWING CERTIORARI. Filed June 19, 1972.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is set for oral argument with No. 6314.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No.

JOHN H. CHAFEE, SECRETARY OF THE NAVY, PETITIONER

v.

JOHN W. FLEMINGS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General on behalf of John H. Chafee, Secretary of the Navy, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit holding that respondent's 1944 court-martial conviction for auto theft must be vacated since it was not "service connected" under *O'Callahan v. Parker*, 395 U.S. 258, and that *O'Callahan* applies retroactively.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is not yet reported. The opinion of the district court (App. B, *infra*) is reported at 330 F. Supp. 193.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*) was entered on March 28, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

(1)

QUESTIONS PRESENTED

1. Whether the holding in *O'Callahan v. Parker*, 395 U.S. 258, should be applied retroactively to invalidate a conviction that had become final long before the date of that decision.

2. Whether respondent's 1944 court-martial conviction for stealing an automobile while he was absent without leave from his naval unit in wartime was "service connected" within the test of *O'Callahan v. Parker*, 395 U.S. 258.

STATEMENT

The relevant facts are set out in the opinion of the court of appeals (App. A 8-9). In 1944 respondent, then a seaman in the United States Naval Reserve stationed at the Naval Ammunition Depot in New Jersey, failed to return on time from a three-day leave. Subsequently, while absent without leave, he was arrested for auto theft in Pennsylvania by officers who discovered him in a car which had been stolen in Trenton, New Jersey, the previous day.¹ Respondent was transferred by the state police to military authorities who charged him with being absent without leave for thirteen days and with theft of an automobile from the possession of a civilian while the

¹ Respondent's complaint in this case (set forth in full in the Appendix to our brief in the court of appeals (C.A. App. 4a-5a), which we are lodging with the Clerk of this Court, makes it clear that the events giving rise to the car theft charge occurred while respondent was leaving his military station without permission. (According to respondent, he was given a ride in the car and then received permission to drive it away himself.) The events were thus not unrelated to his AWOL status.

United States was at war. At the court-martial proceedings held at the Brooklyn Navy Yard respondent, on the advice of military counsel, pleaded guilty to both charges. He was sentenced to three years' incarceration, loss of pay and a dishonorable discharge. After more than two years of confinement he was released and dishonorably discharged on October 23, 1946.

On June 2, 1969, this Court in *O'Callahan v. Parker*, 395 U.S. 258, held that courts-martial do not have jurisdiction over all offenses committed by servicemen but only over those which are "service connected." In October 1970 respondent filed the present action in the United States District Court for the Eastern District of New York seeking to overturn his 1944 court-martial conviction for auto theft and to compel the correction of his military records with respect to the dishonorable discharge.² He did not challenge the validity of his conviction for being absent without leave. On July 19, 1971, the district court, in a written opinion, held that the court-martial conviction for auto theft was invalid under *O'Callahan* and must be vacated. It remanded the case to the Board for Correction of Naval Records with instructions to change respondent's dishonorable discharge to a discharge of no greater disapprobation than bad conduct. 330 F. Supp. 193. On appeal, the Second Circuit affirmed, holding that respondent's auto theft conviction

² The action was stayed while respondent exhausted his military remedies—i.e., the Judge Advocate General and the Board for Correction of Naval Records. These bodies denied his applications for correction of his military records on May 21 and 24, 1971, respectively.

was not "service connected" within the principles of *O'Callahan* and that the *O'Callahan* decision should be applied retrospectively (App. A, *infra*).

REASONS FOR GRANTING THE WRIT

1. There is a conflict among the circuits over whether the holding of *O'Callahan v. Parker*, 395 U.S. 258, should be applied retroactively. Contrary to the holding below, the Fifth Circuit, in *Gosa v. Mayden*, 450 F. 2d 753, 766, petition for a writ of certiorari pending, No. 71-6314, and the Tenth Circuit, in *Schlomann v. Mosely*, No. 473-70, decided March 24, 1972, have recently determined that *O'Callahan* should not be given retroactive application, the position also taken by the Court of Military Appeals in *Mercer v. Dillion*, 19 U.S.C.M.A. 264, 41 C.M.R. 264.³

In *Relford v. Commandant*, 401 U.S. 355, this Court's grant of certiorari included the question of the retroactivity of *O'Callahan*. Although the Court did not reach the issue, it noted "that the retroactivity question has important dimensions, both direct and collateral * * *." 401 U.S. at 370. In *Gosa v. Mayden*, *supra*, we agree with petitioner that this Court should grant certiorari to resolve the conflict among the circuits. Particularly since this case involves an important question concerning the offenses

³The Court of Military Appeals did decide in *Mercer* that in the exercise of its supervisory function it would apply *O'Callahan* to court martial convictions pending on direct review. See *Enzor v. United States*, 20 U.S.C.M.A. 257, 43 C.M.R. 97.

reached by *O'Callahan*, we think it would be appropriate for the Court to hear this case as a companion to *Gosa*.

2. Whether *O'Callahan* bars court martial proceedings for auto theft committed by a serviceman who is absent without leave during wartime is an important question that this Court should decide. This Court has not spoken with respect to the application of *O'Callahan* to wartime offenses, although it has noted that the wartime court-martial power is considerably broader than in peacetime. See *Reid v. Covert*, 354 U.S. 1, 33-34; cf. *United States v. Averette*, 19 U.S.C.M.A. 363, 41 C.M.R. 363. Particularly in light of the increased size of the military forces in wartime, this issue is one of great significance. It is arguable that, as to members of the armed forces themselves, in view of the increased need for discipline and morale, the wartime court-martial power is plenary and embraces all offenses. In the instant case, not only was the offense committed in wartime but during the time the defendant was absent without leave, a dereliction of duty over which the court-martial clearly had jurisdiction. Moreover, the theft of an auto, increasing the defendant's mobility, could well be said to have been in furtherance of unlawfully remaining absent without leave. In these circumstances, we think the court of appeals' holding that the auto theft charge was not "Service connected" was erroneous and should be reversed by this court.⁴

⁴ The court of appeals indicated (App. A, *infra*, p. 13) that it reached its result in part because only two of the twelve factors enumerated in *Relford* militating in favor of court-martial jurisdiction were present: *i.e.*, lack of proper absence from the base and commission during wartime. The court did

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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APRIL 1972.

not consider the fact that the auto theft could be deemed closely related to the military offense of being AWOL. Moreover, it is not the number of factors alone which should dictate the result, since not all the factors set forth in *Relford* have an equal bearing on the *O'Callahan* rationale. For example, the appellate courts have uniformly determined that where the offense did not occur within the United States, the service-connection test is automatically met (irrespective of any other factor) since the alternative to court-martial trial is trial by the foreign country without the benefit of the Fifth and Sixth Amendment rights to indictment by grand jury and a jury trial. See, e.g., *United States v. Keaton*, 19 U.S.C.M.A. 64, 41 C.M.R. 64; *Gallagher v. United States*, 423 F. 2d 1371 (Ct. Cls.), certiorari denied, 400 U.S. 849; *Bell v. Clark*, 437 F. 2d 200 (C.A. 4); *Hemphill v. Mosley*, 443 F. 2d 322 (C.A. 10).

APPENDIX A

United States Court of Appeals for the Second
Circuit

No. 528—September Term, 1971

No. 71-1997

UNITED STATES OF AMERICA, *ex rel.*
JOHN W. FLEMINGS, *Appellee*

—v.—

JOHN H. CHAFEE, SECRETARY OF THE NAVY,
Appellant

Before: KAUFMAN, MANSFIELD and OAKES, *Circuit Judges.*

Appeal from the United States District Court for the Eastern District of New York.

KAUFMAN, *Circuit Judge:*

Toward the end of its 1968 Term, the Supreme Court virtually sounded the death knell for court-martial jurisdiction which had been exercised over certain cases for more than fifty years. *O'Callahan v. Parker*, 395 U.S. 258 (1969), decided that the Armed Services had no power to try servicemen for alleged crimes or offenses triable in civilian courts and which were without substantial military significance or "service connection." We are now asked to decide whether *O'Callahan*, which itself overturned a final conviction, applies retroactively to another court-

martial conviction for a non-service connected offense which became final prior to June 2, 1969, the date of that decision.¹

John W. Flemings, in 1944 an eighteen-year-old seaman second class in the United States Naval Reserve stationed at the Naval Ammunition Depot in Earle, New Jersey, failed to return to his base after a seventy-two-hour leave. While AWOL, he was arrested for auto theft near Hollidaysburg, Pennsylvania, by Pennsylvania State Troopers who discovered him in an automobile which had been stolen the previous day in Trenton, New Jersey. The victim of the theft was a member of the United States Signal Corps who lived away from the naval base. The car was his personal property, he was on a purely personal errand in Trenton when the car was stolen, and at no time was he reimbursed by the military for any expenses incurred in the operation of the automobile. After being apprehended by the State Troopers, Flemings was transferred to military custody and incarcerated at Harts Island, New York. A court-martial subsequently was convened at the Brooklyn Navy Yard, the specification charging him with being AWOL for thirteen days and stealing an automobile "from the possession of a civilian." On the advice of military "counsel", he pleaded guilty and was sentenced to

¹ The Supreme Court in *Relford v. Commandant*, 397 U.S. 934 (1970), granted *certiorari* specifically to consider the issue raised here. In disposing of the case, however, the Court determined that Relford's offense was service connected and accordingly did not reach the retroactivity question. *Relford v. Commandant*, 401 U.S. 355, 369 (1971).

The United States Court of Military Appeals, the court of last resort for direct review of courts-martial convictions, see 10 U.S.C. § 867, has applied *O'Callahan* to all cases subject to direct review on the date of that decision. *E.g.*, *United States v. Borys*, 18 U.S.C.M.A. 259 (1969); *United States v. Prather*, 18 U.S.C.M.A. 560 (1969).

incarceration for three years, loss of his pay and a dishonorable discharge.²

In the wake of *O'Callahan* and long after the completion of his prison sentence,³ Flemings now seeks to have his conviction vacated and his discharge changed to honorable, contending that the auto theft was not service connected and thus not a proper basis for court-martial jurisdiction. This action was brought in the Eastern District of New York.⁴ Judge Weinstein, in a carefully considered opinion, decided that the theft of the automobile by Flemings⁵ was not service connected and that the conviction for that offense was void under *O'Callahan* because the court-martial lacked subject matter jurisdiction. He remanded the case to the Board for Correction of Naval Records with instructions to vacate the conviction and the dishonorable discharge and to enter a discharge no

² The maximum punishment for two weeks unauthorized absence—the offense which admittedly was service connected within the meaning of *O'Callahan*—was only six months' confinement, loss of pay and allowances, reduction to the lowest enlisted pay grade and a bad conduct discharge.

³ Flemings served twenty-six months in prison and was dishonorably discharged on October 23, 1946.

⁴ The action was stayed while Flemings exhausted his administrative remedies. Flemings's applications for correction of his military records were denied by the Judge Advocate General and the Board for Correction of Naval Records, respectively, on May 21 and 24, 1971.

⁵ It is of some interest that Flemings alleged before Judge Weinstein that he was innocent of the charge of auto theft. He claimed that another sailor picked him up while he was hitchhiking and that he never had knowledge that the automobile had been stolen. The sailor, according to Flemings, had left the car for a short while to visit a friend and fled when he saw the State Troopers arresting Flemings.

worse than bad conduct.* 330 F.Supp. 193 (E.D.N.Y. 1971). From this determination the government appealed. We affirm the district court.⁷

I.

The threshold question is whether the offense of stealing a privately owned automobile, not being utilized for military purposes, while it was parked on a Trenton, New Jersey street, was "service connected." In *O'Callahan* the Court was faced with harmonizing the constitutional power of Congress to make "Rules for the Government and Regulation of the land and

* There is no claim that the conviction for being AWOL, which carried with it a potential bad conduct discharge, is invalid.

⁷ Other courts which have considered the question presented to us have held that courts-martial convictions for non-service connected offenses which became final before June 2, 1969, are not subject to collateral attack under *O'Callahan*. *Gosa v. Mayden*, 450 F.2d 753 (5th Cir. 1971); *Schlomann v. Moseley*, No. 473-70 (10th Cir. Mar. 24, 1972); *Thompson v. Parker*, 308 F.Supp. 904 (M.D. Pa.), *appeal dismissed*, No. 18, 868 (3d Cir. April 24, 1970); *Mercer v. Dillon*, 19 U.S.C.M.A. 264 (1970).

The following commentators have predicted or favored retroactively: Blumenfeld, *Retroactivity After O'Callahan: An Analytical and Statistical Approach*, 60 Geo. L.J. 551 (1972); Wilkinson, *The Narrowing Scope of Court-Martial Jurisdiction: O'Callahan v. Parker*, 9 Washburn, L.J. 193 (1970); Note, *O'Callahan v. Parker, A Military Jurisdictional Dilemma*, 22 Baylor L. Rev. 64 (1970); Note, *Denial of Military Jurisdiction over Servicemen's Crimes Having No Military Significance and Cognizable in Civilian Courts*, 64 Nw. U.L. Rev. 930 (1970).

Nelson and Westbrook, *Court-Martial Jurisdiction Over Servicemen for "Civilian" Offenses: An Analysis of O'Callahan v. Parker*, 54 Minn. L. Rev. 1 (1969); Note, 44 Tulane L. Rev. 417, 424 (1970), do not favor retroactivity.

For a compilation of general commentaries on *O'Callahan*, see *Relford v. Commandant*, 401 U.S. 355, 356 n. 1 (1971).

naval forces," Art. I, § 8, cl. 14, with the constitutional guarantees of an indictment by a grand jury⁸ and a trial by a jury of one's peers.⁹ The Court recognized that "the exigencies of military discipline require the existence of a special system of military courts in which not all of the specific procedural protections deemed essential in Art. III trials need apply," 395 U.S. at 261, but added emphatically that Article I, section 8, clause 14, read in conjunction with the "necessary and proper" clause,¹⁰ authorizes Congress only to invest military courts with " 'the least possible power adequate to the end proposed.' " *Id.* at 265, quoting *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 23, (1955), quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821). Article I is a narrow concession to military need, not to be read expansively as licensing broad-based exceptions to the protective benefits afforded by civilian trials.

⁸ The fifth amendment provides in part: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; . . .

The phrase "when in actual service in time of War or public danger" modifies only "Militia." See, e.g., *Johnson v. Sayre*, 158 U.S. 109, 114 (1895).

⁹ Article III, section 2, clause 3 provides: The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

The six amendment provides in part: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . .

¹⁰ Article I, section 8, clause 18 empowers Congress "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, . . ."

Accordingly, the Court held that the military status of the defendant was not *ipso facto* sufficient to establish court-martial jurisdiction. It instructed that the nature, the time and the place of the offense must be "service connected," thereby posing a threat to the "special needs of the military." But words, even in their literal sense, frequently require further elucidation. Thus, two years later, in *Relford v. Commandant*, 401 U.S. 355, 365 (1971), the Court enumerated the eleven factors which led it to conclude that O'Callahan, who was charged with assault and attempted rape while on an evening pass from his army post in Hawaii, was not properly court-martialed:

1. The serviceman's proper absence from the base.
2. The crime's commission away from the base.
3. Its commission at a place not under military control.
4. Its commission within our territorial limits and not in an occupied zone of a foreign country.
5. Its commission in peacetime and its being unrelated to authority stemming from the war power.
6. The absence of any connection between the defendant's military duties and the crime.
7. The victim's not being engaged in the performance of any duty relating to the military.
8. The presence and availability of a civilian court in which the case can be prosecuted.
9. The absence of any flouting of military authority.
10. The absence of any threat to a military post.

11. The absence of any violation of military property.

Relford listed a twelfth factor implicit in the eleven considered in *O'Callahan*—"The offense's being among those traditionally prosecuted in civilian courts."

Clearly, each case must be approached *ad hoc* in light of the many factors to be considered. *Id.* at 365-66. But the balance must be struck on qualitative as well as quantitative grounds. *Relford*, for example, was charged with the rape of a girl and a woman on the Fort Dix, New Jersey, military reservation. The fourteen year old girl, a sister of a serviceman stationed at Fort Dix, was abducted at the point of a knife while waiting for her brother on a base parking lot; the woman, who worked as a waitress at the post exchange and was the wife of an Air Force man stationed at the adjacent McGuire Air Force Base, was driving to work when she too was abducted at the point of a knife and then raped at the fort's training area. Consideration of factors 4, 6, 8, 11 and 12 and perhaps 5 and 9 weighed against court-martial jurisdiction, while factors 1, 2, 3, 7 and 10 supported jurisdiction. *Id.* at 366. The court-martial conviction was sustained, Justice Blackmun stating for the court "that when a serviceman is charged with an offense committed within or at the geographical boundary of a military post and violative of the security of a person or of property there, that offense may be tried by a court-martial." *Id.* at 369.

In the case before us, it would appear that only factors 1 and 5 support court-martial jurisdiction; *Flemings* was AWOL, and in 1944 the United States was engaged in World War II. Accordingly, the government argues that the confluence of these two fac-

tors was sufficient to sustain court-martial jurisdiction. We do not agree.

The United States Court of Military Appeals, in considering this question, has instructed that AWOL status *ipso facto* will not confer court-martial jurisdiction over a civilian offense committed while AWOL. *See, e.g., United States v. Armes*, 19 U.S.C.M.A. 15 (1969) (no jurisdiction where defendant stole a car while AWOL).¹¹ We are not to be understood, however, as suggesting that an unauthorized absence is not a more serious breach of military duty and a greater threat to military discipline during wartime than in peacetime. No court has ever challenged the power of the military to deal swiftly with that offense, and, in doing so, to consider the relative threat it posed to the military's mission. Because the military can protect its special needs by asserting court-martial jurisdiction over the purely military offense of being AWOL, it is inappropriate for it to urge that the "paramount" nature of military discipline during wartime justifies it in sweeping within the jurisdiction any offense committed by a serviceman—no matter where—even when that offense by itself has no inherent relationship to the war effort and in no way hinders that effort. Flemings' offense was not committed on a military installation nor was it violative

¹¹ *Armes* is strikingly similar to this case. *Armes*, while AWOL (but wearing his fatigue uniform), stole the car of a retired Army major. It should be noted that *Relford* did not enumerate as a relevant factor that the serviceman was in or out of uniform. The Military Court of Appeals has considered the wearing of a uniform relevant to court-martial jurisdiction only where the uniform facilitated the crime. *See, e.g., United States v. Peak*, 19 U.S.C.M.A. 19 (1969); *United States v. Morisseau*, 19 U.S.C.M.A. 17 (1969). In any event, Flemings has alleged that he left Fort Dix in civilian clothes and did not wear his uniform again until after he was arrested.

of a person or of property located there, as in *Relford*. Although the car Flemings allegedly stole while it was parked on a street in Trenton belonged to a member of the Signal Corps, that fact was a "happencance" with "no military significance." *Id.* at 16. The government does not suggest that the theft interfered in any way with the owner performing his military duties.¹²

We conclude that under these circumstances, the fact that this car theft occurred during wartime bore no special relevance to military discipline. Accordingly, this factor is deserving of little weight under the *Relford* equation. The other circumstances tilt the *Relford* scale heavily in favor of our conclusion that the auto theft was not service connected: one, the crime, traditionally prosecuted by civilian authorities, was not committed on a military installation or in an area subject to military control; two, neither the defendant nor the victim were engaged in military duties at the time of the crime; three, there was no threat to the security of a military post or violation of military property and no direct flouting of military authority; and finally, the civilian courts were open and readily available in 1944 to prosecute the offense. Under these circumstances, we do not perceive any special needs of military discipline which justified encroaching on the benefits of civilian trial and the guarantees of Article III and the fifth and sixth amendments.

¹² The argument has been made that detention and prosecution by state authorities might have prevented Flemings from being present to perform *his* military duties, see *O'Callahan v. Parker*, 395 U.S. at 282-83 (Harlan, *J.* dissenting), but the evidence does not indicate that Flemings was in any way indispensable to his unit, and the government's conduct in transferring Fleming to Hart Island makes clear that his contribution to the war effort was not required.

II.

We turn now to a consideration of the more difficult question presented—whether *O'Callahan v. Parker, supra*, should be applied retrospectively.

Until its decision in *Linkletter v. Walker*, 381 U.S. 618 (1965), the Supreme Court “without discussion, [had] applied new constitutional rules to cases finalized before the promulgation of the rule.” *Id.* at 628. But, commencing with *Linkletter*, which decided that *Mapp v. Ohio*, 367 U.S. 643 (1961),¹³ would not apply to cases which had become final before the decision in *Mapp* was filed, the Court has applied a three-pronged interested balancing test in, deciding whether *new pronouncements of criminal procedure* will be applied retroactively or only prospectively.¹⁴ We emphasize that this new approach has been applied only to cases establishing new rules of criminal procedure. See *Adams v. Illinois*, 40 U.S.L.W. 4255, 4256 (U.S. Mar. 7, 1972). The classic statement of the test appeared in Justice Brennan's opinion in *Stovall v. Denno*, 388 U.S. 293, 297 (1967):

The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administra-

¹³ *Mapp*, overruling *Wolf v. Colorado*, 338 U.S. 25 (1949), held that the due process clause of the fourteenth amendment required state courts to exclude evidence seized in violation of the search and seizure provisions of the fourth amendment.

¹⁴ The Supreme Court cases applying the *Linkletter* doctrine, excluding those cases decided during the latter part of the 1970 Term, are catalogued in the appendix to the opinion of our venerable brother, Judge Medina, in *United States v. Liguori*, 439 F. 2d 663, 670-76 (2d Cir. 1971).

tion of justice of a retroactive application of the new standards.

The government, relying heavily on the decision of the Fifth Circuit in *Gosa v. Mayden*, 450 F.2d 753, 758 (5th Cir. 1971), argues that the retroactivity *vel non* of *O'Callahan* should be scrutinized under *Linkletter* and its progeny notwithstanding that the result in *O'Callahan* turned on the lack of subject matter jurisdiction and not a new rule of criminal procedure.

A. THE RATIONALE OF O'CALLAHAN—JURISDICTION

The rationale of *O'Callahan* was founded on the concept of jurisdictional power in the traditional sense and not on functional or procedural deficiencies which are considered an abuse of properly vested adjudicatory power. See *Gosa v. Mayden*, 450 F.2d at 756-57; *Schlomann v. Mosley*, No. 473-70 (10th Cir. Mar. 24, 1972); U.S. *ex rel. Flemings v. Chafee*, 330 F.Supp. at 195-97; Note, *The Supreme Court, 1968 Term*, 83 Harv. L. Rev. 7, 212 (1969); but see *Mercer v. Dillon*, 19 U.S.C.M.A. 264 (1970). As we discussed at the outset, the court in *O'Callahan* sought to define what offenses Congress, without exceeding the constitutional limits of Article I, section 8, could authorize the military to try by court-martial. The court stated its holding unequivocally in terms of "jurisdiction" in the traditional sense: "We have concluded that the crime to be under *military jurisdiction* must be service connected. . . ." 395 U.S. at 272 (emphasis added). If the Court's opinion leaves any doubt as to its meaning, and we do not believe it does, it is obviated by Mr. Justice Harlan's dissent which succinctly framed the issue confronted by the Court as one of "subject matter jurisdiction of courts-martial." *Id.* at 276.

The Court stressed the procedural differences between the operation of Article III courts and courts-

martial to emphasize that an unwarranted extension of court-martial jurisdiction would encroach on the fundamental constitutional rights of grand jury indictment and trial by petit jury—which Justice Douglas, writing for the Court, referred to as the “constitutional stakes” of the litigation. *Id.* 262. In construing the decision, it is important to note that the Court did not in any sense “reform” court-martial procedures or suggest that current procedures are inadequate in trials for offenses which are service connected. Nor did the Court suggest that courts-martial constitutionally could assume jurisdiction over offenses which are not service connected if they provided the protective benefits of grand jury indictment and trial by jury. Thus, we see no basis for concluding that this case fits within the same mold as *Mapp* and others where convictions were overturned not because the trial court lacked adjudicatory power, but because procedures were constitutionally defective and thus merely an abuse of properly vested adjudicatory power.

B. RETROACTIVITY AND JURISDICTIONAL DEFECT

The important question we must resolve cannot be considered without reference to the rich history elucidating the effect of an unconstitutional law. Almost 100 years ago, in *Ex parte Siebold*, 100 U.S. 371, 376–77 (1879), the Supreme Court stated that “[a]n unconstitutional law is void, and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment.” *See also Norton v. Shelby County*, 118 U.S. 425, 442 (1886); *Chicago, I & L. Ry. v. Hackett*, 228 U.S. 559, 566 (1913). This doctrine—that convictions rendered by a court lacking either personal or subject matter jurisdictions

are void—has been a fundamental part of our common law jurisprudence. Accordingly, even at a time when issues cognizable in habeas corpus proceedings were severely limited, civilian courts exercised collateral review of courts-martial convictions where lack of jurisdiction was alleged. See *McClaghry v. Deming*, 186 U.S. 49 (1902); *Ex parte Reed*, 100 U.S. 13 (1879), Note, *Developments in the Law-Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1209 (1970).

We are not suggesting for a moment that courts-martial are a modern-day Star Chamber or no more than sophisticated kangaroo courts, but we assert confidently that trial in an Article III court is "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (Cardozo, J.). Courts-martial, however, which derive their power from the congressional authority reposed in Article I, section 8, clause 14, are the fulcrum of "a system of military justice with fundamental differences from the practices in the civilian courts." *O'Callahan v. Parker*, 395 U.S. at 262. Thus, when military jurisdiction exceeds its "proper domain," *id.* at 265, it treads on the command that *no person* shall be deprived of life, liberty or property without due process of law, albeit that its procedures may not shock our conscience.¹⁵

In our view, the recent Supreme Court cases denying retrospective application to new rules of criminal procedure where, and only where, as we shall see

¹⁵ The grant of power in clause 14 is basically a response to the abuses of royal prerogative, or, in our frame of reference, the potential of unbridled executive discretion. That the Constitution shifted the focus of control from the executive to the legislative branch does not mean that "Congress might legislate at will with regard to members of the armed forces." Duke and Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 Vand. L. Rev. 435, 447-49 (1960).

below, the old rules did not threaten the basic integrity of the court's truth determining process, are not compelling precedent when applied to a case founded on an absence of jurisdiction or power over the subject or person. Not one of the cases establishing a new principle which was limited to prospective application involved a total absence of adjudicatory power. Moreover, if some decisions which were not based upon concepts of jurisdictional competence have been applied retroactively, *see e.g., Witherspoon v. Illinois*, 391 U.S. 510 (1968); *Roberts v. Russell*, 392 U.S. 293 (1968), *a fortiori* a case which rests on lack of jurisdiction in the traditional sense and seeks to preserve the basic integrity of the institutions which enforce our criminal laws, must be so applied. *See United States v. United States Coin & Currency*, 401 U.S. 715, 724 (1971) (Harlan, J.).

The government argues that the *Linkletter* line of decisions must be read in light of *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940), and that when so done, authority exists for denying retroactive effect to *O'Callahan*. In *Chicot*, bondholders of a state drainage district who had been parties to a debt readjustment proceeding under a federal statute sought to recover on the original bonds, alleging that the debt readjustment was invalid because the statute subsequently had been declared unconstitutional. The Supreme Court recognized that the court which decreed the readjustment did not have subject matter jurisdiction, but nevertheless applied the doctrine of *res judicata* in denying the bondholders relief. *Chicot*, however, was not a criminal case, nor was it concerned with the liberty or the fundamental rights to a fair trial. *See generally* Note, *Prospective Operation of Decisions Holding Statutes Unconstitutional or Overruling Prior*

Decisions, 60 Harv. L. Rev. 437, 446-48 (1947). But cf. *Warring v. Colpoys*, 122 F.2d 642 (D.C. Cir.), cert. denied, 314 U.S. 678 (1941). *Chicot* was a civil proceeding concerned simply with whether a debt was still owing. Although the doctrine of finality bears an important place in the jurisprudence of criminal law, see Bator, *Finality in Criminal Law and Federal Habeas Corpus*, 76 Harv. L. Rev. 441 (1963), it is "more firmly settled in the context of civil litigation." Mishkin, *The Supreme Court, 1964 Term—Foreward: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 77 (1965). The primary function of habeas corpus is "to secure individual freedom from unjustified confinement," even though the petitioner may be confined pursuant to a final judgment, *Id.* at 79. Moreover, *Chicot* involved vested rights of third parties who, relying in good faith on the seeming validity of the Court's decree readjusting the debt, purchased new bonds. It would have been strikingly unjust to deprive these third parties of vested rights when the original bondholders had failed to raise any constitutional objections during the readjustment proceedings and before the rights had vested.

The recent decision in *United States v. United States Coin & Currency*, *supra*, buttresses our conclusion that *Chicot* should not be transported *ipse dixit* to the arena of criminal litigation. *Coin* involved an action by the government for forfeiture of money allegedly used in illegal bookmaking operations. See 26 U.S.C. § 7302. Subsequently, the Supreme Court voided the Internal Revenue laws which were the basis of the forfeiture proceeding. *Marchetti v. United States*, 390 U.S. 39 (1968); *Grosso v. United States*, 390 U.S. 62 (1968). The government urged that *Marchetti* and *Grosso* should not be given retro-

active application because an overwhelming number of suits would be commenced by gamblers who had been subjected to forfeitures in earlier proceedings and would now seek to reclaim their property. In rejecting this contention, Justice Harlan, in a characteristically scholarly opinion, adhered rigidly and categorically to the concept that judgments of a court without subject matter jurisdiction were void. 401 U.S. at 723-24.

We draw further support from *North Carolina v. Pearce*, 395 U.S. 711 (1969). The Court decided, *inter alia*, that *Benton v. Maryland*, 395 U.S. 784 (1969), which held that the fifth amendment guaranty against double jeopardy is enforceable against the states, would apply retroactively. *Benton*, we note, is similar to *O'Callahan* in that Benton's conviction was overturned because, under the double jeopardy clause, he should not have been retried. Accordingly, the trial court was devoid of subject matter jurisdiction. Although *Linkletter* had been decided more than four years before, and the doctrine of prospective limitation had become a familiar tool of appellate decision, it was so clear to the *Pearce* Court that *Benton* should be applied retroactively that it did not even discuss the application of *Linkletter*.

III.

Although we conclude that *O'Callahan* must be applied retroactively because that decision was grounded in the absence of jurisdiction to adjudicate, we feel obliged to indicate that our application of the *Linkletter* doctrine to *O'Callahan* also would lead us to conclude, unlike other courts,¹⁶ that *O'Callahan* must be applied retroactively.

¹⁶ See note 7 *supra*.

A. THE PURPOSE TO BE SERVED

The initial and most crucial question to be asked in deciding whether a new ruling is to be applied retroactively is what purpose or objective was to be achieved by the new standard. *See, e.g., Williams v. United States*, 401 U.S. 646, 653 (1971) (opinion of White, J.). The underlying goal of *Mapp v. Ohio*, for example, was to deter state authorities from conducting illegal searches and seizures by imposing the sanction of excluding the evidence seized. This principal purpose—future deterrence—would not have been enhanced by overturning past convictions based on illegally seized evidence. The end to be served by *O'Callahan*, however, was to afford a serviceman charged with a non-service connected crime committed off-post with at least the benefits of grand jury indictment and trial by petit jury before he could be deprived of his liberty or property. Retroactivity achieves this objective.

But, that does not end our inquiry, for even if a new standard is designed to insure the fairness of a trial and preserve the integrity of the fact-finding process, it does not follow that it will be applied retroactively if the old standard did not present a "clear danger of convicting the innocent." *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966).¹⁷ The courts that have concluded that *O'Callahan* should not be applied retroactively have relied heavily on *De Stefano v. Woods*, 392 U.S. 631 (1968), which considered the retroactivity of *Duncan v. Louisiana*, 391 U.S. 145 (1968), and *Bloom v. Illinois*, 391 U.S. 194 (1968). *Duncan* applied the sixth amendment to the states through the fourteenth amendment and required the

¹⁷ This assumes, of course, that there was justifiable reliance on the old standard and that retroactive application would adversely affect the administration of justice.

states to provide jury trials in serious criminal cases; *Bloom* extended the right to jury trial to state trials for serious criminal contempt. *De Stefano*, although recognizing retrial for those who had been subjected to the procedures now declared unconstitutional would afford them the coveted right to a jury trial, decided against retroactive application. After quoting from *Duncan*:

We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury,

the Court concluded:

The values implemented by the right to jury trial would not measurably be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial.

392 U.S. at 634.

Although the basic values served by the decisions in *Duncan* and *Bloom*, and in *O'Callahan* are similar, the Supreme Court instructed in *Johnson v. New Jersey*, 384 U.S. 719, 728–29 (1966), “whether a rule of criminal procedure does or does not enhanced the reliability of the fact-finding process at trial is necessarily a matter of degree.” The facts and *ratio decidendi* of *O'Callahan* undermine any compelling analogy between this case and *De Stefano*.

Justice Douglas, writing for the majority in *O'Callahan*, quoted extensively from *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), which decided that a serviceman could not be subjected to court-martial after he has been discharged. Particularly pertinent was the Court's observation in *Toth* “that

military tribunals have not been and probably never can be constituted in such a way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts." *Id.* at 17. A brief overview of some of the procedures applicable when Flemings was court-martialed will reveal that this statement is not to be taken with a grain of sand or as evidencing a mere "belief that a civilian court trial with grand and petit jury protections would tend to prevent arbitrariness and repression and be fairer." *Gosa v. Mayden*, 450 F. 2d at 765. Indeed, Justice Douglas's appraisal was based on the procedures afforded after the Uniform Code of Military Justice was adopted in 1950. 10 U.S.C. § 800 *et seq.* We need not speculate as to how much greater the discrepancy must have been between Article III courts and courts-martial before its adoption.¹⁸ But, Senator Ervin of North Carolina was moved to comment:

Prior to 1950 the American in uniform had been at the mercy of legal procedures little changed since before the Revolutionary War, procedures originally designed for mercenaries—not for citizen soldiers loath to give up the rights they were defending. So antiquated and unjust was the system that after World War II a great protest came from returning veterans demanding reforms which would guarantee to servicemen basic principles of due process of law.

¹⁸ In some respects many court-martial procedures now compare favorably with practices in civilian courts. *See generally* Quinn, *Some Comparisons Between Courts-Martial and Civil Practice*, 15 U.C.L.A. L. Rev. 1240 (1968).

115 Cong. Rec. S 6760-61 (Daily ed. June 19, 1969).

At the time of Flemings's court-martial the fact-finding body consisted of a panel of officers hand-picked by the officer convening the court-martial. Since his officer normally had direct command authority over the members of the panel—who could convict by a bare majority—it is realistic to assume that there was an ever-present danger of command influence. See *O'Callahan v. Parker*, 395 U.S. at 264 & n.5. Each member took his place, heard the evidence, and rendered his opinion, fully aware of the implications inherent where the commanding officer convened the court, and selected its members and the counsel on both sides. Moreover, the pervasive atmosphere of the court-martial process was the "age-old manifest destiny of retributive justice." *Id.* at 264.

The relative deficiencies of Flemings's court-martial procedures were not limited to the reliability of the fact finder. The record in this case reveals that Flemings was represented by "counsel." But, under regulations applicable in 1944, "counsel" was an officer assigned to assist the accused; there was no requirement that he have legal training.¹⁹ In addition, the right to compulsory process for obtaining evidence and witnesses was, to a significant extent, dependent on the approval of the prosecution. *Id.* at 264 n. 4. This limitation could be particularly devastating to the defense, because courts-martial often were not convened in the vicinage where the alleged offense was

¹⁹ Naval Courts and Boards, Ch. IV, § 358 (1937). We note that the right to appointed counsel when one is charged with a serious offense, although applied to the states for the first time in 1963, is considered so fundamental to a fair trial that it has been applied retroactively. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

committed.²⁰ Flemings, for example, was court-martialed at the Brooklyn Navy Yard in Brooklyn, New York, although the car was stolen in Trenton, New Jersey, and he was arrested near Hollidaysburg, Pennsylvania. Any likely witnesses, therefore, were located in New Jersey or Pennsylvania. Clearly, the procedures were not conducive to the effective presentation of a defense.²¹

The obvious conclusion, and one warranted by the Court's thorough discussion in *O'Callahan* and *Toth*, is that the court-martial procedures employed there raised a "clear danger of convicting the innocent." *Tehan v. United States ex rel. Shott*, 382 U.S. at 416. Justice White's discussion of the *Linkletter* line of decisions sets forth the rationale in pithy fashion:

Where the major purpose of new constitutional doctrine is to overcome an aspect of the crim-

²⁰ Fleming's claims, as a separate ground for relief, that he was denied the right to trial in the vicinage guaranteed by Article III, section 2, clause 3:

The trial of all crimes, except in cases of impeachment, shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

In light of our conclusion that *O'Callahan* must be applied retroactively, we do not reach this question.

²¹ In comparing *O'Callahan* to *Duncan* with respect to *DeStefano* and concluding that it "could not assert that every criminal trial or any particular trial by court-martial is unfair or that an accused may never be as fairly treated by members of a military court as he would by a civilian jury," the Court of Military Appeals noted that in many cases that would be affected by a retroactive application of *O'Callahan*, the accused had pleaded guilty. How could it be argued, it asked, that the accused in such a case had been subjected to an unfair trial on the issue of guilt. *Mercer v. Dillon*, 19 U.S.C.M.A. at 268. The answer comes quickly that the court-martial procedures we have described certainly would weigh heavily in inducing the accused to plead guilty.

inal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances. *Williams v. United States*, 401 U.S. at 653 (footnote omitted).²²

B. IMPACT OF RETROACTIVITY²³

We are told that retroactive application of *O'Callahan* may require the Armed Forces to vacate thou-

²² See cases cited in *Williams v. United States*, 401 U.S. at 653 n. 6.

²³ Although the history of "reliance" by the military is of some interest, we believe it would unduly protract this opinion to deal at great length with this element, particularly when that history is so abstruse. Courts-martial have exercised their jurisdiction over so-called "civilian" crimes pursuant to congressional authorization, since 1916. Act of August 29, 1916, Ch. 418 § 1342, 39 Stat. 650; see *Duke and Vogel, supra*, 13 Vand. L. Rev. at 449-53. Although this jurisdiction was not supported by any prior holding of the Supreme Court, language in several cases supports an inference that mere military status was sufficient to permit trial by court-martial. See, e.g., *Ex parte Mulligan*, 71 U.S. (4 Wall.) 2, 123 (1866); *Coleman v. Tennessee*, 97 U.S. 509 (1878); *Smith v. Whitney*, 116 U.S. 167, 184-85 (1886); *Johnson v. Sayre*, 158 U.S. 109, 114 (1895); *Grafton v. United States*, 206 U.S. 333, 348 (1907); *Reid v. Covert*, 354 U.S. 1, 22-23; *Kinsella v. Singleton*, 361 U.S. 234, 240-43 (1960).

Nevertheless, a line of Supreme Court cases steadily had narrowed the permissible limits of court-martial jurisdiction from jurisdiction over civilians bearing a remote relationship to the Services to jurisdiction over those actually serving. These cases emphasized the same constitutional considerations which led the

sands of court-martial convictions.²⁴ Not only will discharge records have to be changed, but questions of retroactive pay and veterans benefits will be involved. At first blush the administrative burden might appear staggering, but, in actuality, the great bulk of claims will entail routine processing. Each branch of the Armed Services already has a Board for Correction of Military Records, *see* 10 U.S.C. § 1552(a), which has established procedures for handling such claims. It is more significant, however, that very few servicemen have sought collateral review of their convictions under *O'Callahan*. *See* Blumenfeld, *Retroactivity After O'Callahan: An Analytical and Statistical Approach*, 60 Geo. L.J. 551, 578 & n. 141. The burden would be reduced further, as Judge Weinstein suggested in his opinion below, if Congress were to adopt a short statute of limitations for those who would apply for retroactive benefits.

Nor do we envision a significant impact on the administration of justice. Federal courts may be called upon where a serviceman has been denied an administrative remedy on the ground that his offense was service connected. Although *O'Callahan* gave little guidance on this question, *Relford*, while adhering to

O'Callahan Court to the service-connection test. *See, e.g., United States ex rel. Toth v. Quarles, supra* (discharged servicemen cannot be court-martialed); *Reid v. Covert*, 354 U.S. 1 (1957) (civilian employees of military personnel accompanying them overseas cannot be court-martialed); *McElroy v. Guagliardo*, 361 U.S. 278 (1970) (civilian employees of Armed Forces overseas not subject to court-martial). Since *O'Callahan* was not an abrupt change of direction for the Court, but a marked extension of a discernible trend, its coming "was clearly prophesied, if one had the ears to hear and the eyes to read." *Mercer v. Dillon*, 19 U.S.C.M.A. at 273 (Ferguson, J., dissenting).

²⁴ See the statistics collected in Blumenfeld, *supra*, 60 Geo. L.J. at 578-81.

an *ad hoc* approach, indicates that the single most important factor will be whether the offense occurred on base. We would expect that a large number of cases will be easily disposed of under this standard.

O'Callahan, decided more than two years ago, has yet to stir an influx of litigation which threatens to overwhelm the floodgates.

We cannot conclude without discussing the far-reaching institutional considerations which govern and reinforce our conclusion that *O'Callahan* must be applied retroactively. The litany that judicial decisions must be so applied, traceable to Blackstonian concepts, is firmly embedded in the development of our common law jurisprudence. See generally Mishkin, *supra*, 79 Harv. L. Rev. at 58-76. Although *Linkletter* departed from this norm, it did so only "in the interest of justice." 381 U.S. at 628. Nevertheless, the Court did apply the exclusionary rule of *Mapp v. Ohio* to Mrs. Mapp herself and to all cases pending on direct review at the time of the decision, even though to do so did not foster the primary purpose of *Mapp*—to deter future searches and seizures in violation of the fourth amendment. With the passage of time, the Court hesitated to apply new decisions even to cases on direct review. For example, the principles of *Escobedo v. Illinois*, 378 U.S. 478 (1964), and *Miranda v. Arizona*, 384 U.S. 436 (1966), were applied only to trials commenced after the dates of those decisions. *Johnson v. New Jersey*, 384 U.S. 719, 733 (1966). Justice Harlan has forcefully characterized this as "[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule * * *." *Mackey v. United States*, 401 U.S. 667, 679 (1971).

Whether or not one agrees with Justice Harlan's view that this is "an indefensible departure from [the timeworn] model of judicial review," *id.*, or with Justice Douglas that it is "inherently invidious," *Adams v. Illinois*, 40 U.S.L.W. at 4258 (dissenting), the evils would be all the more apparent and the injustices all the more pronounced if the Court were to snare one case (*O'Callahan's*) from the realm of finality, relieve the petitioner of a claimed and now recognized injustice, but relegate all others subject to the same injustice to the fate of not having been the lucky chosen one. That is what the government now urges. We must remember that it was in a habeas corpus proceeding that the Supreme Court in *O'Callahan* afforded relief from a final conviction.

To our knowledge, the Supreme Court always has applied new rules announced in habeas corpus cases retroactively. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963), *Jackson v. Denno*, 378 U.S. 368 (1964). This is hardly surprising, however, for the reason lies in the very function of the writ as explained by Justice Brennan in the landmark decision of *Fay v. Noia*, 372 U.S. 391, 401-02 (1963):

Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints.

There is no indication whatsoever that in deciding to grant *O'Callahan's* petition the Supreme Court intended to depart from the traditional concept of the Great Writ. The identical principles which were at stake in *O'Callahan* and motivated the Court to grant

collateral relief compel us to hold that Flemings is entitled to the same collateral relief.

Finally, we reiterate that we are not concerned here merely with defects in the procedures employed at Flemings's court-martial, but as the *ratio decidendi* of *O'Callahan* made clear, with the total absence of power to judge him.

The Court is grateful to Michael Meltsner, Esq., who, as assigned counsel, represented appellee with skill.

Judgment affirmed.

APPENDIX B

UNITED STATES OF AMERICA EX REL.

JOHN W. FLEMINGS, PLAINTIFF

v.

HON. JOHN H. CHAFEE, SECRETARY OF THE NAVY,
DEFENDANT

No. 70-C-1267

United States District Court,

E. D. New York

July 19, 1971

MEMORANDUM AND ORDER

WEINSTEIN, *District Judge.*

This is an action to overturn a 1944 court-martial conviction for automobile theft and to compel the correction of military records from a dishonorable discharge to a general discharge under honorable conditions. Both parties have moved for summary judgment. Since the crime was not service related, the court-martial had no jurisdiction, the conviction was void, and the discharge records must be corrected.

I. FACTS

The material facts are undisputed. In August, 1944, plaintiff, then eighteen years old, was a seaman second class in the United States Naval Reserve. He was granted permission to leave his base, the Naval Ammunition Depot, Earle, New Jersey, for 72 hours but failed to return on time. While absent without official leave, he was arrested for automobile theft by Penn-

sylvania State Troopers near Hallidaysburg, Pennsylvania.

Transferred to military custody, plaintiff was incarcerated at Harts Island, New York. Court-martial proceedings were held at the Brooklyn Navy Yard before a court of retired senior naval officers. On advice of military counsel, he pled guilty to the charges of automobile theft and of being absent without leave for thirteen days. He was sentenced to three years incarceration, loss of pay and a dishonorable discharge. The maximum punishment at that time for a two week unauthorized absence was confinement for six months plus the period of absence, loss of all pay and allowances during a like period, reduction to the lowest enlisted pay grade, and a bad conduct discharge. After 26 months of confinement, during which he was repeatedly disciplined for infractions, plaintiff was released and dishonorably discharged.

The automobile had been stolen while it was parked on a street in Trenton, New Jersey, the day before plaintiff was arrested. The owner, a member of the United States Signal Corps, did not witness the theft; he lived off base and received no compensation from the military for the car's use. He was on a personal errand in Trenton when the vehicle was stolen. The court-martial specification itself charges plaintiff with stealing an automobile "from the possession of a civilian."

Plaintiff alleges that he had been hitchhiking—in civilian clothes according to his own supplemental affidavit—when he was picked up by another sailor in the automobile; that he was merely a passenger; and that he was not aware that it was stolen. According to him, the driver stopped beside the highway to visit a friend in a nearby farmhouse. While plaintiff

was waiting in the car the arresting state troopers stopped to investigate. He alleges that as they talked with him the troopers saw the other sailor running away. It is his contention that his version of the story was corroborated by the state troopers' interview of a gas station attendant shortly after the arrest.

Both parties agree that all administrative remedies have been exhausted. The Judge Advocate General has ruled that no action to modify the sentence is warranted. The Board for Correction of Naval Records has denied plaintiff's request for reconsideration of his application for correction of his military records. The case is ripe for adjudication.

Defendant does not now contest this Court's jurisdiction to review the refusal of the Board for Correction of Naval Records to grant the petition for a change in the form of plaintiff's discharge. 28 U.S.C. § 1361; *Ashe v. McNamara*, 355 F.2d 277, 282 (1st Cir. 1965). *Cf. Smith v. Resor*, 406 F.2d 141, 146-147 (2d Cir. 1969).

II. VENUE

Though not raised in the answer, lack of venue has been asserted in a subsequent motion to dismiss.

[1, 2] Venue is properly laid, among other places, in the judicial district where the "cause of action arose." 28 U.S.C. § 1391(e). The "cause of action" in this case may, as defendant asserts, have arisen in Washington, D.C., the district where the Board for the Correction of Naval Records refused to grant plaintiff's petition; but it also had its roots in this district where the court-martial proceeding was held. The cause of action for venue purposes can be said to arise wherever substantial material events took place. *Cf. Alameda Oil Company v. Ideal Basic Indus., Inc.*, 313 F. Supp. 164, 168-169 (W.D.Mo.1970).

[3] In any event, defendant waived the objection

by failing to raise the venue issue in its answer or by pre-pleading motion. Fed.R.Civ.P. 12(b) (h); *Concession Consultants, Inc. v. Mirisch*, 355 F.2d 369, 371 (2d Cir. 1966); *United Rubber C., L. & P. W., Local 102 v. Lee Rubber & Tire Corp.*, 269 F.Supp. 708, 713-714 (D.N.J.1967), *aff'd*, 394 F.2d 362, cert. denied, 393 U.S. 835, 89 S.Ct. 108, 21 L.Ed.2d 105 (1968); 1 J. Moore, *Federal Practice* ¶ 0.146 [1] [6] (1964).

III. CONTENTIONS OF PARTIES

Plaintiff's legal and factual submission can be summarized in the following syllogism:

1. A court without subject matter jurisdiction has no power to affect the status of a person before it because its purported decisions are void.

2. The court-martial had, under the holding of *O'Callahan v. Parker*, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969), no subject matter jurisdiction.

3. The court-martial's decision that he was guilty of automobile theft was void and the dishonorable discharge predicated upon this decision must be set aside.

The government's response is:

1. When the Supreme Court spoke of lack of jurisdiction in *O'Callahan* it did not mean lack of power over the subject matter, or, if it did,

2. *O'Callahan*, as interpreted in *Relford v. Commandant, U.S. Disc. Barracks, Ft. Leavenworth*, 401 U.S. 355, 91 S.Ct. 649, 28 L.Ed.2d 102 (1971), does not exclude a case such as plaintiff's from court-martial jurisdiction, or, if it does,

3. *O'Callahan* may not be applied to court-martial convictions which became final before 1969.

IV. JURISDICTION RATIONALE OF O'CALLAHAN

(4) The adjudicatory power of a court is called its jurisdiction. The term, in its primary sense, signifies power to speak the law by applying it to particular cases. If a body lacks jurisdiction over the subject matter or the parties its purported judgments are void. *Ex parte Siebold*, 100 U.S. 371, 25 L.Ed. 717 (1879) *McClaghry v. Deming*, 186 U.S. 49, 22 S.Ct. 786, 46 L.Ed. 1049 (1902) *Rosenberg et al.*, *Elements of Civil Procedure*, 143-145 (1970); *Restatement (Second), Conflict of Laws*, chap. 3, Introductory Note (c), 127-128 (P.O.D. Draft, Part 1, May 2, 1967) ("competence"). In recent years the term has acquired a secondary meaning: courts have been said to lack jurisdiction not because they lack adjudicatory power but because they failed to exercise their power in a proper manner. *See, e.g.*, *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) (right to counsel).

In criminal law this second usage has expanded greatly, in part because the remedy of habeas corpus was originally based on lack of jurisdiction. *See Developments in the Law, Federal Habeas Corpus*, 83 *Harv.L.Rev.* 1038, 1045-1055, 1209-1216 (1970). As habeas corpus was increasingly used to collaterally attack state and federal convictions on the ground of unconstitutional procedures leading to conviction, much of the new criminal constitutional law took on a jurisdictional cast. This new usage included such diverse matters as the right to counsel, to suppress il-

legally obtained evidence, to a jury trial and to confrontation.

Lack of precision in the use of the word "jurisdiction" creates part of the difficulty with retroactivity which is discussed in VI, *infra*. Use of the word "competence" when lack of adjudicatory power is meant, as suggested in the Restatement of Conflicts, Second, *supra*, would avoid some of the confusion but this terminology has not yet been adopted by the Supreme Court.

In analyzing the retroactivity problem some have suggested that the limitations on the exercise of court-martial power in *O'Callahan* were "functional" rather than "jurisdictional"—that is to say, the decision was based on procedural deficiencies rather than lack of power. *See, e. g.*, Schlomann v. Moseley, No. L-1003, p. 2 (D.C.Kansas, May 19, 1970); *United States v. King*, A.C.M. 20361 (July 30, 1969). The language of the Supreme Court makes that conclusion doubtful.

O'Callahan involved a habeas corpus proceeding challenging the jurisdiction of a court-martial to try a soldier who assaulted a girl on private property while he was on leave and in civilian clothes. The grant of certiorari was ambiguous in its use of the term jurisdiction, since the question posed was:

"Does a court-martial * * * have jurisdiction * * * thus depriving him of his constitutional rights to indictment by a grand jury and trial by a petit jury in a civilian court?" 393 U.S. 822, 89 S.Ct. 177, 21 L.Ed.2d 93 (1968).

It is not clear that the question was whether the court-martial lacked power over the subject matter and person of the soldier before it because this type of case should go to a different kind of court (classic competence jurisdiction) or whether denial of the right to a grand and petit jury without waiver caused po-

tential jurisdiction to be lost (procedural-constitutional jurisdiction).

The majority opinion is not completely lucid on the point, but a fair reading suggests that it used the phrase lack of jurisdiction to mean lack of power over the subject matter. Its major thrust is directed to the basic differences between *systems* of military and civilian courts rather than to a few defects of procedure. For example, the court speaks of "development of a system of military justice with fundamental differences from the practices in the civilian courts." *O'Callahan v. Parker*, 395 U.S. 258, 262, 89 S.Ct. 1683, 1685, 23 L.Ed.2d 291 (1969). The lack of juries is relied upon primarily as an illustration of these "fundamental differences." The court quoted at length from its own decision in *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17-18, 76 S.Ct. 1, 5-6, 100 L.Ed. 8 (1955), to further demonstrate such differences with respect to tenure of judges and command influence. *Id.* at 262-264, 89 S.Ct. at 1685-1686. It also relied on differences in the access of the defense to compulsory process. *Id.* at 264, n. 4, 89 S.Ct. at 1686. Differences in evidence and procedure were noted. *Id.* at 264, 89 S.Ct. at 1686.

Repeatedly the majority's use of the term jurisdiction, in context, denotes lack of power over the subject matter or person. For example, it pointed out that:

"in examining the reach of [military court] jurisdiction, it has recognized that. * * * 'Determining the scope of the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to *'the least possible power adequate to the end proposed.'* *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 22-23, 76 S.Ct. 1, 8, 100 L.Ed. 8."

Id. at 265, 89 S.Ct. at 1687 (emphasis in original).

The following quotations as well as the general tenor of the opinion are consistent with this primary usage:

"The fact that courts-martial have no jurisdiction over nonsoldiers, whatever their offense, does not necessarily imply that they have unlimited jurisdiction over soldiers, regardless of the nature of the offenses charged." 395 U.S. at 267, 89 S.Ct. at 1688.

"Status is necessary for jurisdiction; but it does not follow that ascertainment of 'status' completes the inquiry, regardless of the nature, time, and place of the offense." *Id.*

"The jurisdiction of British courts-martial over military offenses which were also common-law felonies was from time to time extended, but, with the exception of one year, there was never any general military jurisdiction to try soldiers for ordinary crimes committed in the British Isles." 395 U.S. at 269, 89 S.Ct. at 1689.

"In 1950, the Uniform Code of Military Justice extended military jurisdiction to capital crimes

* * * * *

We have concluded that the crime to be under military jurisdiction must be service connected." *Id.* at 272, 89 S.Ct. at 1690.

The dissenting opinion is even more strongly pitched to the concept of jurisdiction as power to adjudicate. It deals with Congressional authority to grant jurisdiction to military courts. It rests its case on the proposition that "it is for Congress and not the Judiciary to determine the appropriate subject-matter ju-

risdiction of courts-martial." *Id.* at 276, 89 S.Ct. at 1692.

Until we are told otherwise by an appellate court we must assume that the Supreme Court used the term jurisdiction in *O'Callahan* in its classic sense to mean lack of competence to adjudicate particular categories of cases.

V. SERVICE CONNECTION

[5] In order for a military tribunal to obtain jurisdiction to try a serviceman the offense charged must be "service connected." *O'Callahan v. Parker*, 395 U.S. 258, 272, 89 S.Ct. 1683, 1690, 23 L.Ed.2d 291 (1969). Substituted for a "status" test—whether the defendant was a member of the Armed Forces—is what has been referred to as a "multi-factor" approach Nelson and Westbrook, *Court-Martial Jurisdiction Over Servicemen For "Civilian" Offenses: An Analysis Of O'Callahan v. Parker*, 54 Minn.L.Rev. 1, 24-34 (1969). Although this approach may lead to a more just result, it has increased the difficulties in determining court-martial jurisdiction.

Cognizant of the confusion possible under *O'Callahan*, the Supreme Court in *Relford v. Commandant, U.S. Disc. Barracks, Ft. Leavenworth*, 401 U.S. 355, 91 S.Ct. 649, 28 L.Ed.2d 102 (1971), enumerated twelve factors to be considered in deciding whether a particular crime by a serviceman is service connected. They are:

- "1. The serviceman's proper absence from the base.
- "2. The crime's commission away from the base.
- "3. Its commission at a place not under military control.

"4. Its commission within our territorial limits and not in an occupied zone of a foreign country.

"5. Its commission in peacetime and its being unrelated to authority stemming from the war power.

"6. The absence of any connection between the defendant's military duties and the crime.

"7. The victim's not being engaged in the performance of any duty relating to the military.

"8. The presence and availability of a civilian court in which the case can be prosecuted.

"9. The absence of any flouting of military authority.

"10. The absence of any threat to a military post.

"11. The absence of any violation of military property.

"12. The offense's being among those traditionally prosecuted in civilian courts." 401 U.S. at 365, 91 S.Ct. at 655.

In *Relford* elements 1, 2, 3, 7 and 10 favored court-martial jurisdiction as did the facts that the victims of the crimes were related to servicemen on the base and property properly on the base was used in perpetrating the crimes. The Court stressed the following interests pointing strongly to service connection:

"(a) The essential and obvious interest of the military in the security of persons and of property on the military enclave. * * *

"(b) The responsibility of the military commander for maintenance of order in his command and his authority to maintain that order. * * *

"(c) The impact and adverse effect that a crime committed against a person or property

on a military base, thus violating the base's very security, has upon morale, discipline, reputation and integrity of the base itself, upon its personnel and upon the military operation and the military mission.

"(d) The conviction that Article I, § 8, Clause 14, vesting in the Congress the power 'To make Rules for the Government and Regulation of the land and naval Forces,' means, in appropriate areas beyond the purely military offense, more than the mere power to arrest a serviceman-offender and turn him over to the civil authorities. The term 'Regulation' itself implies, for those appropriate cases, the power to try and to punish.

"(e) The distinct possibility that civil courts, particularly non federal courts, will have less than complete interest, concern, and capacity for all the cases that vindicate the military's disciplinary problems within its own community. * * *

"(f) The very positive implication in *O'Callahan* itself, arising from its emphasis on the absence of service-connected elements there, that the presence of factors such as geographical and military relationships have important contrary significance.

"(g) The recognition in *O'Callahan* that, historically, a crime against the person of one associated with the post was subject even to the General Article. * * *

"(h) The mis-reading and undue restrictions of *O'Callahan* if it were interpreted as confining the court-martial to the purely military offenses that have no counterpart in nonmilitary criminal law. [and]

"(i) Our inability appropriately and meaningfully to draw any line between a post's strictly military areas and its nonmilitary areas, or between a serviceman-defendant's on-duty and off-duty activities and hours on the post." 401 U.S. at 367-369, 91 S.Ct. at 656-657.

[6] None of these lettered interests are present in the case before us. Of the twelve factors enumerated in the Supreme Court's opinion in *Relford*, ten (2, 3, 4, 6, 7, 8, 9, 10, 11 and 12) clearly point away from courts-martial jurisdiction; only two—1 and 5—arguably support a finding of service connection: at the time the theft was committed plaintiff was absent without leave from his military base, and in 1944 the United States was engaged in a global war. In the circumstances of this case, neither of these two factors permits a finding of service connection.

Although the Court of Military Appeals has "tended to interpret *O'Callahan* somewhat narrowly," Note, 64 *Nw.L.Rev.* 930, 939 (1970), it has held that the fact that the accused was improperly absent from his military base at the time of the alleged offense does not confer jurisdiction on military tribunals. See *United States v. Armes*, 19 U.S.C.M.A. 15, 16, 41 C.M.R. 15, 16 (1969). Absence of plaintiff from his military base without leave did not confer court-martial jurisdiction, particularly since he left the base with the permission of his superiors.

That the offense was committed during World War II has more significance. A sailor imprisoned in a civilian jail awaiting trial in a civilian court is of no use to his military unit and his absence may seriously impair its fighting capacity. If he is under military custody, he can be permitted to continue to perform his duties. See *O'Callahan v. Parker*, 395 U.S. 278,

282-283, 89 S.Ct. 1683, 1696, 23 L.Ed.2d 291 (1969); Note The Supreme Court, 1968 Term, 83 Harv.L.Rev. 62, 219 n. 40 (1969).

The record does not support the inference that this plaintiff was so indispensable to his unit that civilian prosecution might have embarrassed the Navy. After his arrest he made no contribution to the war effort. He was held for trial far from his base and sentenced to confinement.

No special claim is made by the defendant under general war powers. We need not, therefore, consider that question in this case.

Two other factors that might provide a sufficient nexus to the military for court-martial jurisdiction are relied upon by the defendant, although they were not enumerated in *Relford*. First, plaintiff may have been in uniform at the time of the offense—though he denies this; second, the owner of the stolen car was a member of the Armed Forces.

In *United States v. Armes*, 19 U.S.M.C.A. 15, 41 C.M.R. 15 (1969), a case factually quite similar to this one, the United States Court of Military Appeals held that there was no basis for court-martial jurisdiction, even though the defendant was wearing his fatigue uniform when he stole the car, the victim was a retired army major, and the defendant was absent without leave from his base. *Id.* at 16. *Cf.* *United States v. Cook*, 19 U.S.C.M.A. 13, 41 C.M.R. 13, 14 (1969) (dissenting opinion). In instances where the Court of Military Appeals has based court-martial jurisdiction upon the wearing of the uniform, its use has generally facilitated the crime. *See, e.g., United States v. Peak*, 19 U.S.C.M.A. 19, 41 C.M.R. 19 (1969); *United States v. Morisseau*, 19 U.S.C.M.A. 17, 41 C.M.R. 17 (1969). Here there is no evidence that the plaintiff used his military uniform to facili-

tate the commission of the crime. The fact that the owner of the car was a member of the Armed Forces was a "happenstance" with "no military significance." *United States v. Armes*, 19 U.S.C.M.A. 15, 16, 41 C.M.R. 15, 16 (1969).

VI. RETROACTIVITY

Defendant's claim that *O'Callahan* should not be applied retroactively is troublesome. The Supreme Court itself has prophesied in *Delphic* style:

"Some writers assert that the holding [in *O'Callahan*] must be applied retroactively. Others predict that it will not be so applied." *Relford v. Commandant, U.S. Disc. Barracks, Ft. Leavenworth*, 401 U.S. 355, 357, 91 S.Ct. 649, 651, 28 L.Ed.2d 102 (1971) (footnotes omitted).

Traditionally, a ruling that a court lacked jurisdiction (competence) to try a class of cases would be applied to all cases within the class, regardless of the stage of development of the litigation. *Linkletter v. Walker*, 381 U.S. 618, 628-629, 85 S.Ct. 1731, 1737, 14 L.Ed.2d 601 (1965). This doctrine has roots deep in the history of English law. *Id.* at 622-624, 85 S.Ct. at 1734-1735. Its foundation rests on historical notions of courts as institutions and on ingrained conceptions of the judicial process as primarily law applying rather than law making. *See Mishkin, Foreword: The High Court, The Great Writ, and The Due Process of Time and Law*, 79 Harv.L. Rev. 56, 60-72 (1965). Although never completely descriptive of courts actual practice, these beliefs reflect practical and symbolic aspects of the workings of the American judicial system that have not lost their vitality.

Of late the Supreme Court has begun to depart from this tradition in applying new constitutional de-

cisions controlling criminal procedure. In a limited number of instances the Court has refused to apply new rules retroactively, developing a doctrine of "prospective overruling" or "prospective limitation." See generally Mishkin, Foreword: The High Court, The Great Writ, and The Due Process of Time and Law, 79 Harv.L. Rev. 56 (1965); Schwartz, Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin, 33 U.Chi.L.Rev. 719 (1966); Note, Prospective Overruling and Retroactive Application in the Federal Courts, 71 Yale L.J. 907 (1962).

The boundaries of the new principle are, as yet, unclear and its rationale has been only sketchily developed. As Mr. Justice Harlan noted, concurring in *Williams v. United States*, 401 U.S. 646, 676, 91 S.Ct. 1148, 1172, 28 L.Ed.2d 388 (1971):

"The upshot of this confluence of viewpoints was that the subsequent course of *Linkletter* became almost as difficult to follow as the tracks of a beast of prey in search of his intended victim."

See also *United States v. Armiento*, 445 F.2d 869, 870, n. 2 (2d Cir. 1971) ("problems in the area of retroactive application of newly-announced constitutional rulings have not found automatic resolution," citing 1971 Supreme Court decisions). A review of the many opinions in the "retroactivity" decisions this term indicates that the Supreme Court has yet to give precise guidance to the lower federal courts enabling them to predict with any assurance which rulings will not be applied retroactively. See *Mackey v. United States*, 401 U.S. 667, 91 S.Ct. 1160, 28 L.Ed.2d 404 (1971); *Williams v. United States* (*Elkanich v. United States*), 401 U.S. 646, 91 S.Ct. 1148, 28 L.Ed.2d 388 (1971); *United States v. United States Coin and Currency*, 401 U.S. 715, 91 S.Ct. 1041, 28 L.Ed.2d 434

(1971). *Linkletter*, itself, the first attempt to justify the doctrine in its full blown form, presaged its ad hoc nature when it declared the Supreme Court's power to rule prospectively "where the exigencies of the situation require." *Linkletter v. Walker*, 381 U.S. 618, 628, 85 S.Ct. 1731, 1737, 14 L.Ed.2d 601 (1965).

As suggested in Part IV, *supra*, much of the doctrine's popularity has been due to the fact that it enabled the Court to avoid a difficult dilemma. Treating new criminal procedural rulings as, in a sense, constitutional-jurisdictional reduced the conceptual awkwardness in allowing them to be enforced via habeas corpus. Yet, traditional applications of the concept of lack of jurisdiction would have released prisoners who were fairly tried without any of the gains in police deterrence sought from the new rules. Limiting retroactivity reduced the outcry over release of prisoners, making practicable changes by the Supreme Court in criminal procedures grown outrageously incongruent with constitutional premises. See *Williams v. United States*, 401 U.S. 646, 676, 91 S.Ct. 1148, 1172, 28 L.Ed.2d 388 (1971) (Harlan, J., concurring).

The mixture of theory and practical considerations in determining the extent to which new rules will be applied retroactively, particularly in this time of changing personnel and views on the Supreme Court, make reasonable predictions almost impossible. In such circumstances, bearing in mind that the traditional and standard rule is still one of retroactivity and that this is particularly true where jurisdiction in the sense of lack of power over the subject matter or person is involved, a *nisi prius* court should apply the traditional rule unless it is clear that the Supreme Court will not do so.

In *Relford*, the Court just this last term refused to decide the issue of retroactive application of *O'Callahan* though it had granted certiorari on the point. *Relford v. Commandant, U.S. Disc. Barracks, Ft. Leavenworth*, 397 U.S. 934, 90 S.Ct. 958, 25 L.Ed.2d 114 (1970), 401 U.S. 355, 359, 91 S.Ct. 649, 652, 28 L.Ed.2d 102 (1971). In such circumstances the "task of declaring a rule's retrospective effect is better left to the only body that can speak with authority"—a higher court. *Knight v. New York*, 443 F.2d 415 (2d Cir. 1971).

[7] Thus we apply *O'Callahan* retroactively—though with no abiding assurance of how appellate courts will treat the issue. We are mindful of the fact that other courts which have our greatest respect have taken a contrary position. See *Thompson v. Parker*, 308 F.Supp. 904 (M.D.Pa.1970) (dictum); *Gosa v. Mayden*, 305 F.Supp. 1186 (N.D.Fla.1969); *Schlomann v. Moseley*, Civ.No. L-1003 (D.Kan. May 19, 1971); *Mercer v. Dillon*, 19 U.S.C.M.A. 264, 41 C.M.R. 264 (1970) (Ferguson, J., strongly dissenting at 268-274). Learned commentators are in disagreement on the point. Compare Nelson and Westbrook, *Court-Martial Jurisdiction Over Servicemen for "Civilian" Offenses: An Analysis of O'Callahan v. Parker*, 54 Minn.L.Rev. 1, 39-46 (1969); Note, *Court-Marital Jurisdiction Limited to "Service-Connected" Cases*, 44 Tulane L.Rev. 417, 423-24 (1970); Comment, 21 S.C.L.Rev. 781, 793-794 (1969) with Note, 64 Nw.L.Rev. 931, 938 (1970); Comment, 22 Baylor L.Rev. 64, 75 (1970); Note, 9 Washburn L.J. 193 (1970).

The decisions and commentators prospectively applying *O'Callahan* have stressed the jury deprivation aspects of that decision; they analogize to the Supreme Court decision of *DeStefano v. Woods*, 392

U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d 1308 (1968). See *Thompson v. Parker*, 308 F.Supp. 904, 908 (M.D.Pa. 1970); *Mercer v. Dillon*, 19 U.S.C.M.A. 264, 268, 41 C.M.R. 264, 268 (1970); Nelson and Westbrook, Court-Martial Jurisdiction Over Servicemen for "Civilian" Offenses: An Analysis of *O'Callahan v. Parker*, 54 Minn.L.Rev. 1, 41 (1969); Note, Court-Martial Jurisdiction Limited to "Service-Connected" Cases, 44 Tulane L.Rev. 417, 423 (1970). Recognizing that bench trials were not necessarily less fair than jury trials, *DeStefano* denied retroactive application to the newly established right of jury trial in serious state criminal prosecutions. *DeStefano v. Woods*, 392 U.S. 631, 633-634, 88 S.Ct. 2093, 2095, 20 L.Ed.2d 1308 (1968).

This seems too restrictive a reading of *O'Callahan*. The decision rested on concern about fundamental differences in the civil and military justice system. See Part IV, *supra*; Note, Loyola (LA) L.Rev. 188, 200 (1970); Note, 68 Mich. L.Rev. 1016, 1017 (1970); Note, 64 Nw. L.Rev. 930, 937 (1970). Cf. Comment, Colum.J. of Law & Social Problems, 278, 282-311 (1971). If this discrepancy is still serious today, after the institution of the Uniform Code of Military Justice, how much more so must it have been in 1944, when this defendant was court-martialed. As noted by Senator Sam J. Ervin:

"Prior to 1950 the American in uniform had been at the mercy of legal procedures little changed since before the Revolutionary War, procedures originally designed for mercenaries—not for citizen soldiers loath to give up the right they were defending. So antiquated and unjust was the system that after World War II a great protest came from returning veterans demanding reforms which would guar-

antee to servicemen basic principles of due process of law." 115 Cong.Rec. S 6760-61 (Daily ed. June 19, 1969).

If we are correct in believing that the Court in *O'Callahan* meant incompetence to act when it referred to lack of jurisdiction, then it is quite unlike those cases in which retroactivity has been denied. Generally, prospectivity has been used when a court with apparent jurisdiction has utilized some procedure or evidence theretofore thought proper. *See, e.g.*, *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965); *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453 (1966); *Johnson v. New Jersey*, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966); *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). By contrast, the question of lack of subject matter jurisdiction has been considered unwaivable—to be raised at any point in the litigation and on the court's own motion. *See State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530, 87 S.Ct. 1199, 1203, 18 L.Ed.2d 270 (1967); *Capron v. Van Noorden*, 6 U.S. (2 Cr.) 126 (1804); 1 J. Moore, *Federal Practice* ¶ 0.60 [4] (1964).

Even when civilian courts were loath to review any aspect of military adjudications, subject matter jurisdiction could be challenged in a collateral proceeding in the federal courts. *See, e.g.*, *Hiatt v. Brown*, 339 U.S. 103, 111, 70 S.Ct. 495, 498-499, 94 L.Ed. 691 (1950); *McLaughry v. Deming*, 186 U.S. 49, 22 S.Ct. 786, 46 L.Ed. 1049 (1902). In *McLaughry* the Supreme Court sternly emphasized the importance of jurisdiction in approving the granting of a writ of habeas corpus after a court-martial conviction by a regular army court of a volunteer. It declared that no waiver was possible:

"The law said such a court shall not be constituted, and the defendant can not say it may, and consent to be tried by it, any more than he could consent to be tried by the first half a dozen private soldiers he should meet; and the decision of neither tribunal would be validated by the consent of the person submitting to such trial." 186 U.S. at 66, 22 S.Ct. at 793.

In light of this traditional approach to subject matter jurisdiction the prospective limitation cases dealing with newly determined procedural rights and evidentiary considerations do not provide compelling precedents.

Of the opinions considering the new doctrine, the one most in point is *United States v. United States Coin and Currency*, 401 U.S. 715, 91 S.Ct. 1041, 28 L.Ed.2d 434 (1971). In *United States Coin* the government had brought an action for forfeiture of money allegedly used in illegal bookmaking operations. See 26 U.S.C.A. § 7302. Subsequently, the Supreme Court had voided the Internal Revenue laws that were the basis for the forfeiture. *Marchetti v. United States*, 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889 (1968); *Grosso v. United States*, 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 906 (1968). The Court held that the rationale of the earlier decisions precluded collection of the forfeiture and that they must be applied retroactively. Its reason for applying traditional notions of retroactivity was that

"even the use of impeccable factfinding procedures could not legitimate a verdict decreeing forfeiture, for we have held that the conduct being penalized is constitutionally immune from punishment." *United States v. United States Coin and Currency*, 401 U.S. 715, 724, 91 S.Ct. 1041, 1046, 28 L.Ed.2d 434 (1971).

This concept is closely akin to subject matter jurisdiction. In *United States Coin* the conduct was immune from punishment in any court while in the instant case the conduct was punishable but not in this particular court. Both cases involve the power—jurisdiction—to act.

We appreciate the force of the arguments that the military justifiably relied on the pre-*O'Callahan* interpretation of court-martial jurisdiction and that a traditional application of that opinion might have an adverse impact on the validity of hundreds of thousands of past court-martial sentences. See *Thompson v. Parker*, 308 F.Supp. 904, 908, (M. D.Pa.1970); *Gosa v. Mayden*, 305 F. Supp. 1186, 1187 (N.D.Fla.1969); *Mercer v. Dillon*, 19 U.S.C.M.A. 264, 266-67, 41 C.M.R. 264, 266-67 (1970); *Schlomann v. Moseley*, Civ.No.L-1003, pp. 3-4 (D.Kan. May 19, 1971). It is not clear how many men presently incarcerated are involved, but if they have been deprived of liberty by a body lacking power to do so, they should be released. Much of the administrative burden created by applications for more favorable forms of discharge may be handled by Congressional adoption of a short statute of limitations or by administrative remedies.

Even if we are mistaken and *O'Callahan* is a case based purely on denial of the right to jury trial, so that there is no retroactivity under *DeStefano*, it is arguable that an independent constitutional right—trial in the vicinage—has been denied to this plaintiff. This right has yet to be tested and he may raise it for the first time. This is not a problem of retrospectivity as in *Linkletter*, but one of first instance adjudication as in *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). See Comment, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 Yale L.J. 907, 951 (1962).

Had plaintiff been tried in the civil courts in either New Jersey (where the automobile was stolen) or Pennsylvania (where it was driven), he would have been entitled to a trial in the vicinage. *State v. Wyckoff*, 31 N.J.L. 65, 68-69 (Sup.Ct.1864) ("The general rule of law has always been that a crime is to be tried in the place in which the criminal act has been committed"); *State v. Brown*, 1 N.J.Misc. 377, 378 (Sup.Ct.1923) (There should be a strong reason presented to a court why * * * the indictment should be sent to another county for trial."); Pa.Const. Art. I, Sec. 9 ("In * * * criminal prosecutions the accused hath a right to * * * a speedy public trial by an impartial jury of the vicinage."); *Commonwealth v. Wojdakowski*, 161 Pa.Super. 250, 53 A. 2d 851, 855 (Super.Ct.1947) ("The locus of crime is always an issue, for a court has no jurisdiction of the offense unless committed in the county where tried").

The right to be tried in the vicinage has been considered fundamental since Magna Charta. Magna Charta, paras. 17, 18 ("Assizes of novel disseisin, and of mort d'ancestor, and of darrien presentment, shall not be taken but in their proper counties. * * *"). The English practice of trying colonials in England was one of the grievances mentioned in the Declaration of Independence; one of the remonstrances against the King was his "transporting us beyond Seas to be tried for pretended offenses. * * *". The right is mentioned both in Section 2 of Article III of the Constitution and in the Sixth Amendment.

The case before us demonstrates the worth of this right. Here the court-martial proceeding was held in the Brooklyn Navy Yard and plaintiff was incarcerated prior to trial on an island in Long Island Sound. How could he be expected to mount an adequate defense so many miles from the actual locus of the

alleged crime in central New Jersey or Pennsylvania? Certainly distance complicated what was, in any event, a difficult task. This factor is especially important since the Pennsylvania State Troopers may have had exculpatory information.

VII. CONCLUSIONS

Plaintiff's court-martial conviction for automobile theft must be vacated. His request that the Board for Correction of Naval Records be directed to grant him a general discharge under honorable conditions must be denied. The offense of being absent without leave in 1944 carried a permissible penalty of a bad conduct discharge. The matter is remanded to the Board with instructions to erase the conviction for automobile theft and the dishonorable discharge and to enter a discharge of no greater disapprobation than bad conduct.

We would only add that the record of the plaintiff while incarcerated at Portsmouth should be read in light of the facts of his case. If, indeed, he was innocent of the crime charged in the court-martial some bitterness is perhaps understandable and may well have militated against "rehabilitation."

The Court appreciates the assistance of counsel, particularly Michael Meltsner, Esq., and his associates, who have prosecuted, without monetary compensation, various administrative appeals and this case after appointment by the Court.

So ordered.

APPENDIX C

United States Court of Appeals for the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of March one thousand nine hundred and seventy-two.

Present: Hon. IRVING R. KAUFMAN, Hon. WALTER R. MANSFIELD, Hon. JAMES L. OAKES, *Circuit Judges.*

UNITED STATES EX REL. JOHN W. FLEMINGS, PLAINTIFF-
APPELLEE

v.

JOHN H. CHAFEE, SECRETARY OF THE NAVY, DEFENDANT-
APPELLANT

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1398

**JOHN W. WARNER, SECRETARY OF THE NAVY,
PETITIONER**

v.

JOHN W. FLEMINGS

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT**

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A 7-32) is reported at 458 F 2d. 544. The opinion of the district court (Pet. App. B 33-55) is reported at 330 F. Supp. 193.

JURISDICTION

The judgment of the court of appeals (Pet. App. C) was entered on March 28, 1972. The petition for a writ of certiorari was filed on April 27, 1972; it was

granted on June 19, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the holding of *O'Callahan v. Parker*, 395 U.S. 258, should be applied retroactively to invalidate a conviction that had become final long before the date of that decision.

2. Whether respondent's 1944 court-martial conviction for stealing an automobile while he was absent without leave from his naval unit in wartime was "service connected" within the test of *O'Callahan v. Parker*, 395 U.S. 258.

STATEMENT

Respondent, who was then a seaman second class in the United States Naval Reserve stationed at the Naval Ammunition Depot in New Jersey, failed on August 7, 1944, to return on time from an authorized three-day leave (App. 16-17, 53).¹ Approximately two weeks later, while absent without leave, he was apprehended by the state police in Pennsylvania in possession of an automobile which had been stolen two days earlier in Trenton, New Jersey (App. 4, 17, 31). Respondent was then returned to military authorities and confined for trial in New York. He was charged with unauthorized absence from his duty station during wartime for a period of thirteen days, and with theft of an automobile "from the posses-

¹ "App." references are to the appendix filed in this Court.

sion of a civilian"² while the United States was at war (App. 16-17).

A court-martial proceeding was convened at the Brooklyn Navy Yard, and in October 1944 respondent, who was represented by military counsel, entered pleas of guilty to both charges (App. 13-19).³ He was sentenced to three years' incarceration, a reduction in rank to the position of apprentice seaman and dishonorable discharge (App. 20).⁴ After two years' con-

² Although the latter charge alleged that the automobile was stolen from a civilian, one Ernest Bush, it appears that Bush was in fact a member of the armed services at the time that the crime was committed (App. 50-51). But as the court below stated (Pet. App. 8): "The car was his personal property, he was on a purely personal errand in Trenton when the car was stolen, and at no time was he reimbursed by the military for any expenses incurred in the operation of the automobile."

³ Respondent, who at the time of his apprehension was the sole occupant of the automobile, now apparently claims that he was merely a passenger in the vehicle and was unaware that it was stolen (App. 3-4).

⁴ In 1944, prior to enactment of the Uniform Code of Military Justice, each service operated under separate statutes. The Articles for the Government of the Navy (AGN) applicable during this period were embodied in Title 34 of the United States Code, Section 1200. The offense of theft was punishable under Article 8, Paragraph 1, and the offense of absence from station or duty without leave, was punishable under Article 8, Paragraph 19. Permissible punishments for these offenses were provided by Presidential Order, set forth in *NAVAL COURTS AND BOARDS* (1937). The maximum punishment which could be imposed on an enlisted man for the offense of theft of property valued in excess of \$100.00 was confinement for four years and a dishonorable discharge; the maximum punishment for the offense of absence without leave was six months' confinement, an additional period of confinement equal to the period of absence, and a bad-conduct discharge. See *NAVAL COURTS AND BOARDS*, § 457, at pp. 233 and 235.

finement at the United States Naval Prison, Portsmouth, New Hampshire, respondent was released and, on October 23, 1946, he was dishonorably discharged (App. 5, 31-32).

On June 2, 1969, this Court decided *O'Callahan v. Parker*, 395 U.S. 258, invalidating the court-martial conviction of a serviceman for a non-service-connected offense on the ground that he had been denied his constitutional rights to indictment by a grand jury and to trial by jury in a civilian court. In October 1970, respondent instituted the present suit in the United States District Court for the Eastern District of New York, relying on *O'Callahan* and seeking to compel the Secretary of the Navy to overturn his 1944 court-martial conviction for auto theft and to correct his military records with respect to the dishonorable discharge.⁵ He did not challenge the validity of his conviction for being absent without leave.

On July 19, 1971, the district court held (Pet. App. B) that the offense of auto theft was not in these circumstances "service connected," and that *O'Callahan* must be applied retroactively to invalidate respondent's court-martial conviction on that charge. It remanded the case to the Board for Correction of Naval

⁵ The action was stayed pending respondent's exhaustion of military remedies. Respondent's application for correction of his military records was denied by the Judge Advocate General of the Navy on May 20, 1971; this denial was based on decisions of the United States Court of Military Appeals which hold that *O'Callahan* should be given prospective application only (App. 60-63). The Board for Correction of Naval Records also denied relief on the ground that the Board lacks the authority to review court-martial convictions (App. 64-66).

Records with directions to change respondent's dishonorable discharge to "a discharge of no greater disapprobation than bad conduct" (Pet. App. 55).

The court of appeals affirmed (Pet. App. A). The court agreed with the district judge's analysis that, measured by the factors enumerated in *Relford v. Commandant*, 401 U.S. 355, 365, the auto theft was not "service connected." It also agreed that the apparent jurisdictional basis for the decision in *O'Callahan* required full retroactive application. The court of appeals stated further that, while it considered this Court's analysis of the possible retroactivity of "new rules of criminal procedure" to be irrelevant here, it would reach the same result under the "three-pronged interest balancing test" (Pet. App. 16) applied in other retroactivity cases,—i.e., the purpose of the new rule, reliance by the government upon the law as it was before *O'Callahan*, and the practical impact of retroactivity (Pet. App. 23-30).

SUMMARY OF ARGUMENT

I

Whether *O'Callahan v. Parker*, 395 U.S. 258, should be given retroactive effect to upset countless court-martial convictions that have been rendered over many years under the mandate of Congress is, as this Court recently observed in *Relford v. Commandant*, 401 U.S. 355, 370, a "question [that] has important dimensions, both direct and collateral * * *." Despite the view of the court below, we urge that all of the other courts (both military and civilian) that have considered the issue have been correct in concluding that

the retroactivity question is not controlled simply by whether the *O'Callahan* decision can be characterized as "jurisdictional."

In *O'Callahan*, a divided Court held in essence that the normal court-martial authority over servicemen cannot be exercised to take away their Fifth and Sixth Amendment rights to indictment and trial by jury, if the circumstances of the offense do not make it "service connected." Whatever significance might attach to the "jurisdictional" language used in the opinion, the announcement of this new constitutional rule was decidedly "a clear break with the past" (*Desist v. United States*, 394 U.S. 244, 248). Under prior law, it was generally accepted that Congress had constitutionally given military tribunals the power to adjudicate all offenses committed by members of the armed forces; a constitutional construction to the contrary, whatever its implications for future adjudicatory power by courts-martial, does not eliminate the past practice as an operative fact that deserves considerable weight in determining how the new rule should apply. A mechanical understanding of "jurisdiction" as that term was used by the Court in *O'Callahan* is unjustified, since in some senses the servicemen in these now-contested cases were in fact, and under statute, subject to military discipline and control—or "jurisdiction."

In any event, the "jurisdictional" underpinnings of *O'Callahan* are no different from the constitutional principles established in *Duncan v. Louisiana*, 391 U.S. 145, and *Bloom v. Illinois*, 391 U.S. 194,

declaring state courts to be without power to adjudicate certain serious crimes unless the defendant is allowed a jury trial. Yet in *DeStefano v. Woods*, 392 U.S. 631, this Court did not view the retroactivity issue as foreclosed and instead determined that retroactive effect should be denied. So also, the "jurisdictional" terminology used in a related context in *O'Callahan* should not alone compel its retroactive application to invalidate past non-jury court-martial convictions involving "non-service-connected" crimes. Rather, as in *DeStefano*, the issue here must be resolved on the basis of the criteria that this Court has generally invoked in determining the temporal impact of the announcements of new constitutional doctrines in other cases: that is, the purpose of the new rule, reliance by the government upon the law as it was before *O'Callahan*, and the practical impact of retroactivity.

II

Analyzing the decision in this manner requires that *O'Callahan* be given only prospective effect for reasons closely similar to those that led to the decision in *DeStefano* that the imposition of jury trial requirements upon the States should not be retroactive.

a. In terms of the "purpose" criterion, it cannot be said that court-martial convictions without indictment and trial by jury have been inherently so unfair that no past conviction for a "non-service-connected" crime can stand. Although the two systems are not identical, we point out some of the procedural protections given the accused in the military judicial

system that are comparable to those in a civil trial, and others that are more favorable. Just as the values implemented by the right to trial by jury would not have been measurably served by a retroactive application of *Duncan* and *Bloom*, so too the values implemented by the jury (and grand jury) procedures that underlie *O'Callahan* will not measurably be served by giving that decision retrospective effect. The integrity of the fact-finding process is not substantially implicated.

b. The extent to which the military had relied upon pre-*O'Callahan* law as a basis for exercising jurisdiction also points sharply away from retroactivity. Courts-martial for "non-service-connected" crimes have gone on for many years with strong support from a previously unbroken line of decisions in this Court and with express authorization of decisions in the lower federal courts. Certainly when respondent was court-martialed in 1944, military officials had no reason to think that the crime of auto theft committed by a serviceman who was absent without leave during wartime was not subject to military punishment.

c. Moreover, retroactively overturning these earlier convictions would not only free hundreds of those properly found guilty of crimes after trials authorized by the law at the time, but could also generate a substantial amount of civil litigation for correction of military records, back pay and the like. Although the likely number of suits would be smaller, the volume of potential claims if *O'Callahan* is held retroactive may be a million or more. In many such cases it

would be extremely difficult, if not impossible, to reconstruct all of the facts from which "service connection" could be determined under the multi-factor test announced in *Relford*, to say nothing of the problems of marshalling the evidence that would be required for retrial in civilian courts.

Thus here, as in *DeStefano*, the relevant practical considerations require prospectivity and the purpose of the new rule announced in *O'Callahan* permits it, as the Court of Military Appeals and other lower federal courts have held.

III

Even if this were not the case, however, *O'Callahan* would not require an invalidation of respondent's 1944 court-martial conviction for the theft of an automobile while he was absent without leave during wartime, since that offense is "service connected" under the rationale of *Relford*.

Wartime court-martial jurisdiction has long been regarded as considerably broader than in peacetime. Indeed, historically the power of military tribunals to try members of the armed forces in time of war has, because of the increased need for discipline, been understood to be plenary, embracing all offenses. In the instant case, not only was the offense committed in wartime, but also during the period that respondent was absent without leave, a dereliction of duty over which the military clearly had jurisdiction. The theft of the car may properly be viewed as facilitating respondent's efforts to get away from the post and avoid apprehension by increasing his mobility; it thus

could well be said to have been in furtherance of unlawfully remaining absent without leave. As such, the offense was of sufficient concern to the military authorities to support inclusion of that charge along with the AWOL charge in his court-martial.

ARGUMENT

At the end of the 1968 Term, this Court in *O'Callahan v. Parker*, 395 U.S. 258, divided sharply over the question whether a serviceman unquestionably subject to general military discipline can properly be subject to court-martial for the commission of crimes that are not "service connected." The negative response given by the majority in that case rendered unconstitutional in part the express statutory provisions of the Uniform Code of Military Justice making acts not necessarily service-connected punishable by court-martial, if committed by members of the armed forces. Those provisions of the Code have direct statutory antecedents going back to 1916 and, through the general article, back to the beginning of the Republic (see our Brief in *O'Callahan*, No. 646, O.T. 1968, at pp. 11-16, 20-24). We continue to believe that *O'Callahan* was wrongly decided. Of course, before the retroactivity question can be reached, the Court must first determine whether *O'Callahan* is to be followed.*

* In *Relford*, the Court found it unnecessary to decide the retroactivity question presented here, since it concluded that the offense was "service connected" (401 U.S. at 369).

I. REFERENCES TO A JURISDICTIONAL BASIS FOR THE DECISION
IN *O'CALLAHAN* V. *PARKER* DO NOT ESTABLISH THAT RETRO-
ACTIVITY MUST BE ACCORDED AUTOMATICALLY.

If *O'Callahan* is to be followed, it is our position that it should not be given retroactive effect to upset countless court-martial convictions that have been rendered over many years under the mandate of Congress.

Unlike the other courts that have considered this issue,⁷ the courts below regarded certain references to "jurisdiction" in the *O'Callahan* opinions as controlling. We dispute the approach that makes the substantial question of retroactivity *vel non* turn on the decisional technique of attaching a "jurisdictional" label to the *O'Callahan* decision and declaring void all past court-martial convictions involving non-service-connected crimes on the ground that the military tribunals "lacked adjudicatory power" (Pet. App. 18) to try the offenses. Rather, whatever the jurisdictional basis of *O'Callahan*—which, as pointed out by the district court below (Pet. App. 38-39), is itself

⁷ See *Gosa v. Mayden*, 450 F. 2d 753 (C.A. 5), certiorari granted, No. 71-6314 (June 19, 1972); *Schlomann v. Moseley*, 457 F. 2d 1223 (C.A. 10), pending on petition for certiorari, No. 71-6879; *Thompson v. Parker*, 308 F. Supp. 904 (M.D. Pa.), appeal dismissed, C.A. 3, No. 18,868, decided April 24, 1970. And see *Mercer v. Dillon*, 19 U.S.C.M.A. 264, 41 C.M.R. 264.

a matter of some controversy^{*}—we believe that the question whether that decision should be retroactively applied must be decided on the basis of the criteria that this Court has generally invoked in determining the temporal impact of the announcements of new constitutional doctrines in other cases. See, *e.g.*, *DeStefano v. Woods*, 392 U.S. 631; *Stovall v. Denno*, 388 U.S. 293, 297; *Johnson v. New Jersey*, 384 U.S. 719; *Linkletter v. Walker*, 381 U.S. 618.

It has long been recognized that “the actual existence of the law prior to the determination of unconstitutionality ‘is an operative fact and may have consequences which cannot justly be ignored.’” *Linkletter v. Walker*, 381 U.S. 618, 625, quoting *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 374. As recently pointed out in *Williams v. United States*, 401 U.S. 646, 651, this Court in *Linkletter* “firmly rejected the idea that all new interpretations of the Constitution must be considered always to have been the law,” notwithstanding “prior constructions to the contrary * * *.” Although perhaps conceptually more satisfying, it is simply not accurate to pretend that the new an-

^{*} Compare the decision of the Second Circuit in this case (Pet. App. 17-22) with *United States v. King*, 40 C.M.R. 1030, 1035, where the Air Force Board of Review stated: “In our view, the Supreme Court [in *O’Callahan*] was speaking only in terms of placing a limitation on the exercise of jurisdiction—not in terms of its existence or nonexistence.” And see *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 246, where this Court observed that the congressional regulation of land and naval forces “deals neither with power nor with jurisdiction, but with their exercise.”

nouncement merely states what the law "always was." The hallmark of the Court's determination to recognize that constitutional doctrine evolves—and is not "discovered"—has been the candid willingness of the Court to leave undisturbed decisions rendered in conformity with prior constitutional pronouncements, unless substantial justice otherwise requires.

It therefore does not follow from the decision in *O'Callahan*—whether it be construed as holding that "the court-martial lacked power over the subject matter * * * before it" or be read as deciding that "denial of the right to a grand and petit jury without waiver caused potential jurisdiction to be lost * * *" (Pet. App. 38-39)—that military tribunals exercising jurisdiction over non-service-connected crimes prior to the date of the decision were without power to adjudicate. The radical change in the foundations of military justice announced in that decision was, in the most literal sense, "a clear break with the past" (*Desist v. United States*, 394 U.S. 244, 248). The fact that this marked departure from generally accepted principles of military jurisprudence was cast in jurisdictional terms should not, we submit, foreclose consideration under standard criteria as to how *O'Callahan* should apply to situations, such as presented here, where the court-martial conviction became final long ago.

An approach to the retroactivity question that turns on a mechanical application of the concept of "jurisdiction" is unnecessary and unwise. Several factors demonstrate why more reflective analysis of this im-

portant issue is in order. In the cases to which *O'Callahan* would be applied if the decision below is followed, the court-martial defendant, as a member of the armed forces, was unquestionably subject to general military discipline and military jurisdiction. It is important to keep in mind that, unlike in some precursors to *O'Callahan*, we are not dealing with attempts by military courts to usurp civil authority by subjecting civilians to trial before courts-martial.

In addition to jurisdiction over the person, which the courts-martial in these cases undeniably possessed, in a real sense they also had subject matter jurisdiction over the offenses, notwithstanding some of the language in *O'Callahan*. As a comparison of *O'Callahan* and *Relford* indicates, the military authorities were guided by the statutory framework of the Uniform Code of Military Justice (and its predecessors) in asserting the responsibility for disciplining members of the armed forces found guilty of engaging in substantive conduct proscribed by those Articles. The core conduct in those two cases in the substantive sense was quite similar—assault and sexual abuse. It seems to us unwarranted and ill-advised to be bound by notions of “jurisdiction” in deciding whether such convictions should be treated as “void” when the inquiry into “service-connection” depends on elusive and collateral factors not at the heart of the military’s assertion or exercise of disciplinary responsibility for the soldier.

Further, as shown by the facts in the present case, not infrequently a course of conduct by the soldier may have led to several charges, preferred and tried

simultaneously, with one or more evidently "service connected" (being AWOL), and the other of debatable nexus (here, auto theft). Using nice concepts like "adjudicatory power" and "jurisdiction" to distinguish nearly thirty years after the fact which count a court-martial should have dealt with and which it should not does not advance the inquiry whether fundamental unfairness has been worked requiring judicial intervention. Thus, we believe the Court of Appeals for the Tenth Circuit was on the mark when it concluded: "the jurisdictional terminology does not dispense with the duty to decide whether 'the Court may in the interest of justice make the rule prospective * * * where the exigencies of the situation require such an application.' " "

This position conforms with the action taken by the Court in *De Stefano v. Woods, supra*, where it was determined on the basis of the "three-pronged interest balancing test" (Pet. App. 16) first enunciated in *Linkletter* and later followed in *Stovall v. Denno, supra*, 388 U.S. at 297, that the imposition of jury trial requirements upon the States, under *Duncan v. Louisiana*, 391 U.S. 145, and *Bloom v. Illinois*, 391 U.S. 194, should not be retroactive. The constitutional underpinning of *Duncan* and *Bloom* was much the same as in *O'Callahan*: state courts were in effect held to be without power to adjudicate without affording the accused in a serious criminal case the right to trial by jury. That the Court's opinion in *O'Callahan* used jurisdictional references should not obscure the

* *Schlomann v. Moseley, supra*, 457 F.2d at 1227, quoting *Johnson v. New Jersey*, 384 U.S. 719, 726-727.

fact that the same constitutional interests were at stake. The determination that States are required by *Duncan* and *Bloom* to try certain kinds of crimes in courts with juries rather than in other courts was no more a basis in *De Stefano* for automatic invalidation of past non-jury state trials than is the *O'Callahan* requirement that certain charges be tried in civilian rather than military courts a basis here for automatically invalidating past court-martial trials.¹⁰

Contrary to the view of the court below (Pet. App. 21-22), this Court's decision in *United States v. United States Coin and Currency*, 401 U.S. 715, applying *Marchetti v. United States*, 390 U.S. 39, and *Grosso v. United States*, 390 U.S. 62, retroactively to forfeiture proceedings under 26 U.S.C. 7302, does not mandate automatic retroactivity of *O'Callahan*. Forfeiture in *Coin and Currency* had been predicated upon violations of 26 U.S.C. 4411, 4412 and 4901, statutes embodying requirements which this Court had held violative of the privilege against self-incrimination. Retrospective application was there believed compelled because "*Marchetti* and *Grosso* dealt with the kind of conduct that cannot constitutionally be punished in the first instance"; it was conduct "constitutionally immune from punishment,"

¹⁰ Indeed, in cases that are jurisdictional in a more conventional sense, the courts have properly rejected arguments that retroactivity must inexorably follow. See *McSparran v. Weist*, 402 F.2d 867 (C.A. 3), certiorari denied, 395 U.S. 903 (federal courts held to be without diversity jurisdiction to hear child's damage claim where nonresident guardian of the minor is appointed solely to create diversity; given prospective effect only); *Lester v. McFaddon*, 415 F.2d 1101 (C.A. 4) (same).

and thus not properly subject to prosecution in any court (401 U.S. at 723-724). But a determination that the government in general is without power to prosecute and punish certain conduct is readily distinguishable from a requirement, such as imposed in *O'Callahan*, that certain charges, which are admittedly subject to prosecution, should be tried in one forum, where certain procedural protections are available, rather than in a different forum.

The essential thrust of *O'Callahan* is that, under circumstances not amounting to service-connection, the normal court-martial jurisdiction over servicemen cannot be exercised so as to take away their Fifth and Sixth Amendment rights to indictment and trial by jury. Whatever the "jurisdictional" implications of the decision, "the Constitution neither prohibits nor requires [that it be given] retrospective effect" (*Linkletter v. Walker, supra*, 381 U.S. at 629). Rather, the issue is simply—as in other retroactivity cases—whether a new trial right should be given to those already tried. As we have indicated, this issue is to be resolved by application of the same criteria that generally govern in cases of this sort.¹¹ Analyzing *O'Callahan* according to the traditional tests leads to the conclusion that the decision should properly be limited to prospective application only.

¹¹ The fact that *O'Callahan* was a habeas corpus proceeding, and thus, as here, presented the issue of the validity of a court-martial conviction on collateral attack, is not, as suggested by the court below, dispositive of the retroactivity question by virtue of "the very function of the writ" itself. The nature of the proceeding in which the new constitutional standard is

II. THE LIMITATIONS UPON TRIAL BY COURT-MARTIAL NEWLY ESTABLISHED IN *O'CALLAHAN v. PARKER* SHOULD NOT BE APPLIED RETROACTIVELY TO UPSET A CONVICTION THAT BECAME FINAL BEFORE THE DATE OF THAT DECISION.

We come, then, to what this Court stated in *Stovall v. Denno, supra*, 388 U.S. at 297, to be the pertinent considerations that affect the determination whether particular cases articulating new constitutional principles should be applied only prospectively:

- (a) the purpose to be served by the new principles; (b) the extent of the reliance by law enforcement authorities on the prior law; and
- (c) the effect on the administration of justice of a retroactive application of the new approach.

announced has never been accorded special consideration in resolving how that standard should apply; whether the case is one on collateral attack or direct review is purely a matter of happenstance. Finally, even if, as suggested below, constitutional principles announced in habeas corpus proceedings are of greater import than new constitutional standards enunciated in some other procedural context—which we doubt—it is well settled that “the choice between retroactivity and nonretroactivity in no way turns on the value of the constitutional guarantee involved” (*Johnson v. New Jersey*, 384 U.S. 719, 728).

As the Court stated in *Desist v. United States*, 394 U.S. 244, 254-255, n. 24: “* * * the fact that the parties involved in the decision are the only litigants so situated who received the benefit of the new rule is ‘an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum.’ Whatever inequity may arguably result from applying the new rule to those ‘chance beneficiaries’ is ‘an insignificant cost for adherence to sound principles of decision-making.’” And see *Williams v. United States, supra*, 401 U.S. at 659.

a. *Purpose*. In evaluating the first, and "foremost" (*Desist v. United States, supra*, 394 U.S. at 249), of these criteria, it bears repeating at the outset that this Court held for the first time in *O'Callahan* that the exception to the guarantees of indictment and jury trial for "cases arising in the land or naval forces" refers only to those cases involving "service connected" offenses and not, as it had been generally believed, to all offenses by members of the armed forces. This narrow construction was adopted by a majority of the Court (395 U.S. at 272-273) "lest * * * [the Fifth Amendment exception relating to the military] be expanded to deprive every member of the armed services of the benefits of an indictment by a grand jury and a trial by a jury of his peers." With regard to the present question of retroactivity, our concern here is whether the "major purpose" for announcement of this new constitutional rule was "to overcome an aspect of the * * * [court-martial] trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials * * *" (*Williams v. United States, supra*, 401 U.S. at 653). We think not.

In *DeStefano v. Woods, supra*, involving essentially the same "constitutional stakes" (*O'Callahan v. Parker, supra*, 395 U.S. at 262) as here, *i.e.*, the right to trial by jury,¹² this Court observed in a similar con-

¹² *O'Callahan* also speaks of the right to indictment by grand jury. This, however, appears to be a less crucial factor since that provision of the Fifth Amendment has never been held binding upon the States. *Gaines v. Washington*, 277 U.S. 81, 86; *Hurtado v. California*, 110 U.S. 516.

text (392 U.S. at 633) "that the States must respect the right to jury trial because in the context of the institutions and practices by which we adopt and apply our criminal laws, the right to jury trial generally tends to prevent arbitrariness and repression." Even so, the argument for applying *Duncan* and *Bloom* retrospectively was, as we earlier stated, rejected in *DeStefano*, since it was determined that the states' failure to afford defendants this procedure in past criminal trials did not necessarily "[infect] the integrity of the truth-determining process" (*Stovall v. Denno*, *supra*, 388 U.S. at 298). See *Williams v. United States*, *supra*, 401 U.S. at 655-656, n. 7. The Court held in *DeStefano* (392 U.S. at 633-634), quoting *Duncan*, *supra*, 391 U.S. at 158:

* * * "We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury." * * * The values implemented by the right to jury trial would not measurably be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial. * * *

This is the appropriate response to the argument for a retrospective application of *O'Callahan* in the present case. We disagree with the court below that this Court's basic concern in *O'Callahan* to give servicemen who commit non-service-connected crimes the right to jury trial in a civilian court should be taken as resting upon a determination that all court-martial

convictions are inherently unfair. Compare *Gosa v. Mayden*, *supra*, 450 F. 2d at 756, 764, 765; *Schlomann v. Moseley*, *supra*, 457 F. 2d at 1229; *Thompson v. Parker*, *supra*, 308 F. Supp. at 908.¹³ If that were the case, due process would invalidate the court-martial system even in its application to clearly military crimes. Neither in *O'Callahan* nor in any other decision has the Court intimated any such pervasive distrust of the overall court-martial system.

The opinion of Mr. Justice Douglas, speaking for a majority of the Court, is, to be sure, critical of some of the aspects of the military judicial process which distinguish it from a civilian court system (395 U.S. at 263-266). But whether or not one agrees with that assessment—and we believe, along with several commentators,¹⁴ that it is unduly harsh (see pp. 23-28, *infra*)—the fact remains, as pointed out by the Fifth Circuit in *Gosa v. Mayden*, *supra*, 450 F. 2d at 765:

* * * that, demeaning of military justice as these remarks may be, the opinion does not formulate its new constitutional restriction on

¹³ See also Nelson and Westbrook, *Court-Martial Jurisdiction Over Servicemen For "Civilian Offenses": An Analysis of O'Callahan v. Parker*, 54 Minn. L. Rev. 1, 42-43, 58-61 (1969).

¹⁴ See, e.g., Nelson and Westbrook, *supra*, 54 Minn. L. Rev. at 57-58, 61-63; Everett, *O'Callahan v. Parker*, *Milestone or Millstone in Military Justice*, 1969 Duke L. J. 853, 867-868, 889; Comment, *O'Callahan v. Parker*, *A Military Jurisdictional Dilemma*, 22 Baylor L. Rev. 64, 68-69 (1970); and see generally Quinn, *Some Comparisons Between Courts-Martial and Civilian Practice*, 15 U.C.L.A. L. Rev. 1240 (1968); Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 188-189 (1962).

congressional power for the purpose of preventing or undoing the conviction of innocent men. There was no determination that the UCMJ carried a clear danger of convicting the innocent, nor was it adjudicated that Congress had ordained a truth-determining process which lacked integrity or which was infected with procedures which substantially impaired the truth-finding function.

Whatever doubts lingered in this regard after *O'Callahan* were, we think, laid to rest by the unanimous decision of this Court in *Relford v. Commandant, supra*. It was there argued that, for a crime to be "service connected" within the meaning of *O'Callahan*, it must "itself be military in nature, that is, one involving a level of conduct required only of servicemen and, because of the special needs of the military, one demanding military disciplinary action" (401 U.S. at 363). The Court, however, took a broader view of what crimes are properly triable by court-martial (401 U.S. at 364), and held that essentially "civilian offenses" (there, rape) could properly be tried by court-martial if committed by a serviceman in circumstances which, upon a balance of various factors enunciated in *Relford* (401 U.S. at 365-366), warranted the conclusion that the conduct or its impact is "service connected." In view of *Relford*, which like *O'Callahan* involved the crime of rape, we believe that the court below erred in construing *O'Callahan* as an expression by this Court of a lack of confidence

in the fundamental fairness of court-martial procedures. For if there were indeed reservations about the integrity of the military truth-determining process at trials of the sort involved in those cases, the limitation on court-martial jurisdiction would surely have been defined, as was unsuccessfully urged in *Relford*, in terms of crimes that were by nature purely military offenses.¹⁵

Moreover, the ostensible protective purpose of *O'Callahan*—assuring a jury trial in a local civilian court—does not invariably furnish the accused with an advantage, notwithstanding the premise of the holding. As the Court of Military Appeals pointed out in *Mercer v. Dillon*, *supra*, 19 U.S.C.M.A. at 266, 41 C.M.R. at 266, there are “extensive statutory and judicial protections an accused in the armed forces enjoys,” and frequently “the composition of a court-martial is for a member of the armed forces more nearly a jury of his peers than is a civilian panel in a State where the member may be involuntarily stationed.”¹⁶ Indeed, it is not difficult to visualize situations in which a soldier who is off his base and commits a crime against a local resident

¹⁵ As pointed out in *Gosa v. Mayden*, *supra*, 450 F. 2d at 765, the *Relford* decision apparently “extended the jurisdictional reach of military courts to about 80% of those servicemen who might otherwise have been excluded if a narrower definition of *O'Callahan* service connection had been adopted.”

¹⁶ See also Wilkinson, *The Narrowing Scope of Court-Martial Jurisdiction: O'Callahan v. Parker*, 9 Washburn L.J. 193, 207 (1970). The Court has recognized in a separate context the existence of the military as a “specialized community.” *Orloff v. Willoughby*, 345 U.S. 83, 94.

will receive a more objective and sympathetic hearing from a court-martial than from a local jury. In addition, although a grand jury indictment is not utilized in military prosecutions, the serviceman is accorded special protections in the military analog, pretrial investigation under Article 32, 10 U.S.C. 832, that are not available in the grand jury process, including the right to counsel, to present exonerating evidence and to cross-examine witnesses. See *Mercer v. Dillon*, *supra*, 19 U.S.C.M.A. at 266, 41 C.M.R. at 266.¹⁷

Nor does the list of procedural safeguards end there. Indeed, as was noted more than twenty years ago by the Court of Military Appeals in *United States v. Clay*, 1 U.S.C.M.A. 74, 77-78, 1 C.M.R. 74, military due process, although of judicial and legislative derivation, guarantees to servicemen rights that essentially parallel those available to civilian defendants being tried by the civilian courts. And see *United States v. Jacoby*, 11 U.S.C.M.A. 428, 430-431, 29 C.M.R. 244. Thus, members of the armed forces who

¹⁷ Under Article 32, the investigating officer is required to call all available witnesses and to conduct a thorough and impartial investigation. See *Manual for Courts-Martial, United States*, Sec. 34(a) (1951). The failure to comply with Article 32 is ground for reversal. See *United States v. Nichols*, 8 U.S.C.M.A. 119, 23 C.M.R. 343.

By comparison, the grand jury may indict without notifying a potential defendant of the investigation and without affording him an opportunity to call witnesses in his behalf. Moreover, even if called, he is not permitted to be accompanied into the grand jury room by counsel. See Rule 6, Fed. R. Crim. P. In many states, the prosecution may by-pass the grand jury process altogether and proceed by way of information.

are subject to court-martial are entitled, as was pointed out in *Clay, supra*, to be informed of the charges against them, to confront witnesses,¹⁸ to be represented by counsel, to invoke the privilege against self-incrimination, and to have involuntary confessions excluded. In addition, the rights to a speedy (*United States v. Hounshell*, 7 U.S.C.M.A. 3, 21 C.M.R. 129),¹⁹ and public (*United States v. Brown*, 7 U.S.C.M.A. 251, 257, 22 C.M.R. 41) trial have been recognized as fundamental to military due process.²⁰ Further, in *United States v. Doyle*, 1 U.S.C.M.A. 545, 547, 4 C.M.R. 137, it was pointed out that the exclusionary rule announced by this Court in *Weeks v. United States*, 232 U.S. 383, had been followed by the armed services even before the Uniform Code of Military Justice was adopted.²¹ And, more recently,

¹⁸ See *United States v. Sweeney*, 14 U.S.C.M.A. 599, 602, 34 C.M.R. 379 (reversal of conviction where the accused's motion for the appearance of a material witness in his behalf had been denied); *United States v. Thornton*, 8 U.S.C.M.A. 446, 24 C.M.R. 256 (conviction reversed due to prejudicial error in failing to secure by subpoena live testimony of a material defense witness).

¹⁹ And see *United States v. Schalck*, 14 U.S.C.M.A. 371, 373-375, 34 C.M.R. 151, holding that a defendant who entered a plea of guilty and failed at trial to assert that he had been denied a speedy trial had not waived his right to make such a claim.

²⁰ Although unanimity is not required for a court-martial verdict, this Court has held that a less-than-unanimity procedure satisfies due process requirements. *Johnson v. Louisiana*, No. 69-5035, decided May 22, 1972.

²¹ See also *United States v. Vierra*, 14 U.S.C.M.A. 48, 52-54, 33 C.M.R. 260, where a conviction was reversed because evidence was introduced which had been seized in violation of the "mere evidence" rule.

the Court of Military Appeals has held that the requirements of *Miranda v. Arizona*, 384 U.S. 436, are equally applicable to the military. See *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249.²²

These and other substantial protections given accused servicemen have generally dispelled any notion that courts-martial are inherently unfair.²³ Indeed, it has been pointed out that there now seems to be "universal recognition of the U.C.M.J. as the most enlightened military code in history and as [one] affording the basic elements of fairness." *United States ex rel. Guagliardo v. McElroy*, 259 F. 2d 927, 940, n. 29 (C.A.D.C.) (Judge (now Chief Justice) Burger, dissenting).

In those instances where a claim of procedural irregularity has been raised, the Court of Military Appeals, composed of civilian judges who sit for a term of fifteen years (Art. 67, 10 U.S.C. 867), has consistently and fairly reviewed the court-martial conviction for constitutional and other error; like civilian courts, it is wholly free of the possibilities of command influence that underlie many attacks on mili-

²² Nelson and Westbrook, *supra*, 54 Minn. L. Rev. at 60, point out that the impact of *Miranda* upon the military has been less marked than on the civilian law enforcement agencies, since the military had theretofore followed the practice of advising an accused of his right to remain silent.

²³ For a discussion of additional procedural protections accorded to accused servicemen, see Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 Harv. L. Rev. 266, 278, 284, 294-296, 300-301 (1958); Comment, *Courts-Martial Jurisdiction—Service-Connected Crime*, 21 S.C. L. Rev. 781, 787-789 (1969); Warren, *supra*, 37 N.Y.U. L. Rev. at 188-189; Quinn, *supra*, 15 U.C.L.A. L. Rev. at 1242-1243.

tary justice. Its "delicate perceptions," it has been said, "have sniffed out fatal denials of due process in situations in which their presence would probably not have been noticed by most civilian judges." Bishop, *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions*, 61 Colum. L. Rev. 40, 57, n. 87 (1961).²⁴ And, of course, review is ultimately available in the federal courts on habeas corpus to determine that the military tribunals have given fair consideration to a convicted serviceman's basic rights. See, e.g., *Burns v. Wilson*, 346 U.S. 137; compare *United States v. Augenblick*, 393 U.S. 348.

In light of these extensive procedural safeguards embedded in the military system of justice, we do not believe that it can fairly be said that the lack of indictment and jury trial in past courts-martial for "non-service-connected" crimes "presents substantial likelihood that the results of a number of those trials were factually incorrect" (*Williams v. United States*, *supra*, 401 U.S. at 655, n. 7) Just as in *DeStefano*, "[t]he values implemented by" those Fifth and Sixth Amendment rights "would not measurably be served" (392 U.S. at 634), we submit, by applying the new *O'Callahan* rule retroactively to old convictions.

Although the present case antedates enactment of the Uniform Code of Military Justice in 1950,²⁵ this factor does not call for retroactivity of the *O'Calla-*

²⁴ See also Warren, *supra*, 37 N.Y.U. L. Rev. at 189.

²⁵ Following World War II, Congress extensively revised the Articles of War (62 Stat. 627) and by the Act of May 5, 1950, ch. 169, 64 Stat. 107, created the Uniform Code of Military Justice.

han rule. The new Code was designed "to reform and modernize the [military judicial] system—from top to bottom" *Burns v. Wilson*, 346 U.S. 137, 141. But even accepting, as we must, that under the earlier statutory procedures "less emphasis" was given to "protecting the rights of the individual than in civilian society and in civilian courts" (*Reid v. Covert*, 354 U.S. 1, 36), that in our view is not reason to condemn all court-martial convictions prior to 1950 dealing with non-service-connected crimes as inherently unfair because tried without benefit of grand and petit juries. In *Burns*, which involved a court-martial under the former Articles of War, Chief Justice Vinson's opinion concluded that there was no "fundamental unfairness in the process whereby [petitioners'] guilt was determined and their death sentences rendered" (346 U.S. at 142).

This Court observed in *Williams v. United States*, *supra*, 401 U.S. at 655, n. 7, quoting *Stovall v. Denno*, *supra*, 388 U.S. at 298, that "[t]he extent to which a condemned practice infects the integrity of the truth-determining process at trial is a 'question of probabilities.'" "Conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have,"²⁶ we think unwarranted the assumption indulged by the court below (Pet. App. 27) that the absence of the rights discussed in *O'Callahan* in this and other pre-Code court-martial proceedings raises a "clear dan-

²⁶ *Reid v. Covert*, *supra*, 354 U.S. at 36; and see *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17.

ger of convicting the innocent" (*Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416).²⁷

In sum, whether the new constitutional rule announced in *O'Callahan* is considered in the context of the present 1944 court-martial conviction or in the context of the military trials involved in *Gosa*, *Schlomann* and *Thompson* (all post-Code court-martial convictions), its "purpose" is adequately served by prospective application only. Whatever "marginal doubts" might exist "as to the accuracy of the results of past trials" (*Mackey v. United States*, 401 U.S. 667, 675), a backward look at the military judicial system without grand and petit juries does not permit the conclusion that the "newly proscribed practice has probably produced factually improper results in cases where it [has been] employed" (*Williams v. United States*, *supra*, 401 U.S. at 656, n. 7). To the contrary, it seems generally recognized that especially in the last twenty years servicemen have in fact received "many procedural rights which are even more conducive to fact accuracy than most civilian forums accord" (*Gosa v. Mayden*, *supra*, 450 F. 2d at 765).²⁸

²⁷ Here, as we earlier stated, the court-martial conviction resulted from a plea of guilty rather than from a trial, a fact which should not be wholly discounted. Cf. *McMann v. Richardson*, 397 U.S. 759, 773-774.

²⁸ The "purpose" factor in this case thus offers much more support for a prospective application of *O'Callahan* than in other areas where this Court has in the past denied retroactivity. Compare *Desist v. United States*, 394 U.S. at 249-250, n. 14, where the Court noted in making a similar point: "Cf. *Stovall v. Denno*, 388 U.S. 293, 298, where it was conceded that 'the *Wade* and *Gilbert* rules also are aimed at

b. *Reliance*. The second *Stovall* criterion focuses on the extent of reliance by the military upon the law as it was before *O'Callahan* and this factor too calls for non-retroactivity.

Military trial of servicemen for "non-service-connected" crimes (as that term is used in *O'Callahan* and *Relford*) was for many years the established practice. It proceeded not only on an assumption of legitimacy but was reinforced over the years by numerous statements by this Court indicating that the military status of the accused was an adequate predicate for military trial. As it had been expressed in *Kinsella v. Singleton*, *supra*, 361 U.S. at 243, "military jurisdiction has always been based on the 'status' of the accused, rather than on the nature of the offense."

Just as the "States undoubtedly relied in good faith upon the past opinions of this Court to the effect that the Sixth Amendment right to jury trial was not applicable to the States" (*DeStefano v. Woods*, *supra*, 392 U.S. at 634), so also the military authorities and Congress had relied upon the previously unquestioned constitutionality of those provisions of

avoiding unfairness at the trial by enhancing the reliability of the fact-finding process in the area of identification evidence'; *Johnson v. New Jersey*, 384 U.S. 719, 730, where it was recognized that 'Escobedo and *Miranda* guard against the possibility of unreliable statements in every instance of in-custody interrogation'; and *Tehan v. Shott*, 382 U.S. 406, 414, where it was stated that 'the "purpose" of the *Griffin* rule is to be found in the whole complex of values that the privilege against self-incrimination itself represents,' including 'our realization that the privilege, while sometimes "a shelter to the guilty", is often "a protection to the innocent."' *Id.*, at 414-415, n. 12."

the Uniform Code of Military Justice, and its statutory antecedents (see p. 10, *supra*), that authorized courts-martial for non-service-connected crimes committed by servicemen. Although the opinion in *O'Callahan* contains an implicit disclaimer that it was overruling any specific prior decisions (395 U.S. at 267; but see Harlan, J., dissenting, at 275-276),²⁹ it remains the fact that since at least 1916 military authorities pursuant to acts of Congress asserted and exercised court-martial jurisdiction over all crimes by servicemen, and there was no indication in this Court's pre-*O'Callahan* opinions that they were wrong in doing so. To the contrary, those opinions certainly supported a reasonable inference that military status by itself was enough to permit court-martial. See, e.g., *Ex parte Milligan*, 4 Wall. 2, 123; *Coleman v. Tennessee*, 97 U.S. 509; *Smith v. Whitney*, 116 U.S. 167, 184-185; *Johnson v. Sayre*, 158 U.S. 109, 114; *Grafton v. United States*, 206 U.S. 333, 348; *Reid v. Covert*, *supra*, 354 U.S. at 22-23; *Kinsella v. Singleton*, *supra*, 361 U.S. at 240-243.³⁰

²⁹ A decision of non-retroactivity is not conditioned upon the overruling of an earlier decision in announcing a "new" rule. The Court has stated that the *Stovall* standards apply to "the judgment whether a case reversing prior doctrines in the area of criminal law should be applied only prospectively." *DeStefano v. Woods*, *supra*, 392 U.S. at 633 (emphasis added). A reversal of "prior doctrines" may occur (as we contend it did here) irrespective of whether any specific case was overruled. See, e.g., *Johnson v. New Jersey*, *supra*.

³⁰ See also our Brief in *O'Callahan* at 8-16, 20-25. The conclusion of the court below (Pet. App. 28-29 n. 23) that *O'Callahan* was but "a marked extension of a discernible trend" is based on this Court's decisions in *United States ex rel. Toth v.*

The lower federal courts that had squarely faced the *O'Callahan* contention, moreover, had in the past uniformly rejected it. *E.g.*, *Burns v. Taylor*, 274 F. 2d 141 (C.A. 10), certiorari denied, 364 U.S. 837; *Owens v. Markley*, 289 F. 2d 751 (C.A. 7); *Thompson v. Willingham*, 318 F. 2d 657 (C.A. 3); *Wright v. Markley*, 351 F. 2d 592 (C.A. 7); *O'Callahan v. Chief United States Marshal*, 293 F. Supp. 441 (D. Mass). The closest judicial observer of the scene, the Court of Military Appeals, was thus led to conclude (*Mercer v. Dillon*, *supra*, 19 U.S.C.M.A. at 266-267, 41 C.M.R. at 266-267):

The result in *O'Callahan* had not been foreshadowed in other opinions. Before *O'Callahan* the armed forces had absolutely no hint that such considerations as the nature, time, and place of the offense might limit trials by courts-martial. * * * ²¹

Certainly, when respondent was court-martialed in 1944, military officials had no reason to think that the crime of auto theft committed by a serviceman who was absent without leave during wartime was not subject to military trial and discipline.

Quarles, *supra* (discharged servicemen cannot be court-martialed), *Reid v. Covert*, *supra* (civilian employees of military personnel accompanying them overseas cannot be court-martialed), and *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (civilian employees of Armed Forces overseas not subject to court-martial). But those decisions all rested on the traditional notion that military jurisdiction is based on the "status" of the accused, and thus, if anything, foreshadowed the opposite result in *O'Callahan*. See Mr. Justice Harlan's dissent in *O'Callahan*, 395 U.S. at 278-280.

²¹ Accord, *Gosa v. Mayden*, *supra*, 450 F.2d at 765-766; *Schlomann v. Moseley*, *supra*, 457 F. 2d at 1230; *Thompson v.*

O'Callahan was, in short, at least as clear a "break with the past" (*Desist v. United States, supra*, 394 U.S. at 248) as this Court's decision in *Katz v. United States*, 389 U.S. 347. It was not anticipated; nor do we perceive any reason why it should have been. The law as it stood before *O'Callahan* was decided was understandably thought to be controlling. Thus the reliance factor as well strongly favors prospectivity.

c. *Effect*. Closely tied to the issue of reliance is the third relevant inquiry: the disruptive "effect on the administration of justice" that could well result from a retroactive application of *O'Callahan*. This factor too points away from retroactivity.

When the ruling in *O'Callahan* was rendered, the Army Judge Advocate General stated that since 1951 (following passage of the U.C.M.J.) the Army alone had court-martialed approximately 1.3 million men; he estimated that there were some 450,000 court-martial convictions which might be attacked under

Parker, supra, 308 F. Supp. at 908. See also Nelson and Westbrook, *supra*, 54 Minn. L. Rev. at 43.

The sole portent of the result reached in *O'Callahan* was an article published in 1960 by Duke and Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 Vand. L. Rev. 435. The authors based their view on a theory of the "necessary and proper" clause of the Constitution which this Court had rejected in *Reid v. Covert, supra*, and which *O'Callahan* did not purport to revive. The thrust of the article was that the necessary and proper clause was a substantive limitation on the grant of power to Congress in Article I, Section 8, Clause 14 of the Constitution to "make Rules for the Government and Regulation of the land and naval Forces," and that only such civilian offenses as had a military connection could appropriately be deemed "necessary and proper" to court-martial jurisdiction.

the new constitutional rule.³² He further stated that approximately 4,000 men in the combined services were then in prison, and that many more might well seek relief under *O'Callahan* in suits challenging other punishments or involving back pay, veterans' benefits, and other collateral matters.³³ The Court of Military Appeals observed in *Mercer v. Dillon*, *supra*, 19 U.S.C.M.A. at 268, 41 C.M.R. at 268:

³² The Army estimates that between 1940 and 1950 there were approximately 1.2 million men court-martialed; during the same period, the Navy and Marine Corps estimate that they together convicted approximately 1.1 million men by court-martial. While it is unknown how many of these 2.3 million pre-Code convictions were for non-service-connected crimes (as defined in *Relford*), even the smallest percentage could result in a monumental case-load if *O'Callahan* is given retroactive effect.

³³ See Nelson and Westbrook, *supra*, 54 Minn. L. Rev. at 39-40; and see *Gallagher v. United States*, 423 F.2d 1371 (Ct. Cl.), certiorari denied, 400 U.S. 849.

Since these estimates were made prior to this Court's decision in *Relford*, they may now be excessive (see n. 15, *supra*). Moreover, it should be noted that many back-pay claims, and the like, may be foreclosed by the six-year statute of limitations on actions in the Court of Claims. See 28 U.S.C. 2501. In *O'Callahan v. United States*, 451 F.2d 1390 (Ct. Cl.), for example, plaintiff's claim for back pay from the date of unlawful discharge (1961) was barred by the statute of limitations. See also, with respect to suits for back pay, *United States v. Augenblick*, 393 U.S. 348; *United States v. Brown*, 206 U.S. 240; *Swaim v. United States*, 165 U.S. 553. And see *Dynes v. Hoover*, 20 How. 65, and *Wise v. Withers*, 3 Cranch 330, regarding possible damage actions for "illegal" court-martial proceedings. Even taking these considerations into account, however, there still remain a considerable number of court-martial convictions since 1916 that could be brought within the rationale of *O'Callahan*, as modified by *Relford*.

For the one fiscal year of 1968, the Army, the Navy, and the Air Force conducted approximately 74,000 special and general courts-martial. If only the smallest fraction of these courts-martial and those conducted in the other years since 1916 involved an *O'Callahan* issue, it is an understatement that thousands of courts-martial would still be subject to review. The range of relief could be extensive, involving such actions as determinations by the military departments of whether the character of discharges must be changed, and consideration of retroactive entitlement to pay, retired pay, pensions, compensation, and other veterans' benefits. * * *

The court below dismisses this potential administrative and judicial burden by pointing to the paucity of cases in the civilian and military courts in recent years seeking relief under *O'Callahan*. See Blumenfeld, *Retroactivity After O'Callahan: An Analytical and Statistical Approach*, 60 Geo. L. J. 551, 578-581 (1972). But the fact that the announcement of the new constitutional rule has yet to spawn substantial litigation is hardly an answer. For until the court of appeals' decision in the present case in March of this year, both the military (*Mercer v. Dillon*, *supra*) and civilian (*Gosa*, *Schlomann*, and *Thompson*) courts had ruled against applying *O'Callahan* retroactively. Faced with such dim prospects of ultimate success, it is doubtful that many servicemen earlier convicted of non-service-connected crimes were willing to undergo the expense and strain of litigation that a court challenge under *O'Callahan*

would necessarily entail. That reluctance might well disappear, however, if this Court should decide, contrary to our submission, that *O'Callahan* must be given retroactive effect.

In *DeStefano v. Woods*, *supra*, 392 U.S. at 634, the Court attached great weight to the fact that:

the effect of a holding of general retroactivity on law enforcement and the administration of justice would be significant, because the denial of jury trial has occurred in a very great number of cases in those States not until now accepting the Sixth Amendment guarantee.

Precisely the same kind of problem is presented for both military and civilian authorities by the prospect that thousands of past court-martial convictions would be upset by retroactive application of *O'Callahan*. This in itself strongly favors prospectivity.

Nor is the sole concern in this regard with the number of retroactive claims. Also to be considered are the difficulties which are likely to arise in attempting to reconstruct events many years after the crime has been committed. See, *e.g.*, *Adams v. Illinois*, 405 U.S. 278, 284; *Williams v. United States*, *supra*, 401 U.S. at 654; *Desist v. United States*, *supra*, 394 U.S. at 251-252; *Linkletter v. Walker*, *supra*, 381 U.S. at 637-638. These practical problems are likely to frustrate any attempt at retrial in a different forum.

There is still a different kind of practical burden that retroactive effect would have, and that is ascertaining whether the charge itself was "service connected." What we would be faced with is not a determination like the relatively clear-cut decision whether

a newly announced constitutional rule retroactively vitiates an earlier conviction because the record shows the admission of a co-defendant's confession (*Roberts v. Russell*, 392 U.S. 293), or the denial of counsel (*Arsenault v. Massachusetts*, 393 U.S. 5). In the *O'Callahan* type of setting there are likely to be many instances in which the elements of service-connection cannot be determined from a stale record or even from a *de novo* hearing, since a number of the factors pertinent to this special inquiry do not appear in a normal court-martial record and may not now be recapturable. And, as Nelson and Westbrook, *supra*, point out, "the rapid turnover in military personnel and the fact that military people are transferred frequently renders the gathering of witnesses and evidence even more difficult than the already formidable task faced in this regard by civil courts." 54 Minn. L. Rev. at 44.

It seems pertinent to note here as well that the process of making a *nunc pro tunc* determination of "service connection," while simplified as to one class of cases by the intervening decision in *Relford*, has perhaps been complicated for the rest by the enumeration of a dozen different factors bearing on this question (401 U.S. at 365). The possible permutations of pro-and-con combinations are almost endless, and, even after the relevant factors and the direction in which they point are identified, there will remain the debatable—and appealable—determination whether on balance the offense was "service connected." As the opinions of the courts below illustrate, totalling up the pro factors and comparing them with the con factors

in order to make the "service connection" judgment many years after the trial appears unduly cumbersome and not necessarily accurate.

Moreover, even the possibility that the number of convictions actually challenged might turn out to be fewer than seems likely should not materially discount the significance of the impact of a holding of retroactivity, since the "purpose" and "reliance" factors, as we have shown, so strongly counsel against imposing the burden. See *Desist v. United States*, *supra*, 394 U.S. at 251-252. For the foregoing reasons, we submit that the decision in *O'Callahan* should be given prospective operation only.³⁴

³⁴ While the question is not squarely presented in either this case or *Gosa*, there is the matter of where the cut-off point lies if we are correct in our position that *O'Callahan* should be prospective only. As a constitutional matter, we would urge that *O'Callahan* should apply only to cases where the actual court-martial trial began after the decision date, June 2, 1969, making no distinction between cases pending on appellate review and those where the appellate processes had been exhausted. Such a rule would be consistent with this Court's recent retroactivity opinions, which have rejected any such distinction as philosophically untenable, opting in favor of either full retroactivity or full prospectivity. *E.g.*, *Williams v. United States*, *supra*, 401 U.S. at 656-659; *Desist v. United States*, *supra*, 394 U.S. at 252-253; *DeStefano v. Woods*, *supra*, 392 U.S. at 635, n. 2; *Storall v. Denno*, *supra*, 388 U.S. at 300-301.

The Court of Military Appeals has, however, taken a different approach, applying *O'Callahan* to cases that were still subject to appellate review within the military system on June 2, 1969. *E.g.*, *United States v. Borys*, 18 U.S.C.M.A. 547, 40 C.M.R. 259; see *Mercer v. Dillon*, *supra*, 19 U.S.C.M.A. at 265, 41 C.M.R. at 265. Since the Court of Military Appeals has articulated no constitutional rationale for this limited retroactive application, it must be deemed to be an exercise of its special

III. RESPONDENT'S THEFT OF AN AUTOMOBILE WHILE ABSENT WITHOUT LEAVE FROM HIS NAVAL UNIT IN WAR-TIME WAS "SERVICE CONNECTED"

Because the question of whether *O'Callahan* should be applied retroactively is also before the Court in *Gosa v. Mayden, supra*, involving a court-martial conviction for a crime that is concededly non-service-connected,³⁵ we deemed it appropriate here to address the issue of retroactivity first. But we do not concede that this case involves a non-service-connected offense within the meaning of *O'Callahan*; in our view it does not. We now turn to our contention that the crime of auto theft, when committed by a serviceman during wartime while he is absent without leave, is "service connected" within the meaning of *O'Callahan*.

In *Relford v. Commandant, supra*, which analyzed in some depth the *O'Callahan* service-connection test, this Court indicated in factor No. 5 that peacetime jurisdiction of courts-martial might properly be regarded as more limited than that obtaining in time of war (401 U.S. at 365).³⁶ Additionally, it was there

supervisory power over the administration of military justice. Accordingly, it is not necessary for this Court to consider the problem of convictions still in the military appellate process when *O'Callahan* was decided.

³⁵ And see *Schlomann v. Moseley, supra*, presently pending on petition for certiorari, No. 71-6879, also involving an admittedly non-service-connected offense.

³⁶ This Court implied in related contexts that the existence of a state of war is a factor to be considered in determining the extent of court-martial jurisdiction. See *Kinsella v. Singleton, supra*, 361 U.S. at 236; *Grisham v. Hagan*, 361 U.S. 278; *McElroy v. Guagliardo, supra*; *Reid v. Covert, supra*, 354 U.S. at 33.

suggested in factor No. 1 that an improper absence from base at the time of the offense would militate in favor of exercising court-martial jurisdiction. See also *O'Callahan v. Parker*, *supra*, 395 U.S. at 273-274. These two factors—*i.e.*, a declared war³⁷ and an unauthorized absence—are present in this case.³⁸

The first of these, *i.e.*, that we deal here with a war-time rather than peacetime offense, is in our view entitled to considerable weight under the “*ad hoc* ap-

³⁷ Respondent's offense was committed during World War II, prior to any events arguably indicating a cessation of hostilities. Thus, the question of what constitutes “in time of war” is not presented by this case. See Note, *Military Law—“In Time of War” Under the Uniform Code of Military Justice: An Elusive Standard*, 67 Mich. L. Rev. 841 (1969). See also *United States v. Anderson*, 17 U.S.C.M.A. 588, 38 C.M.R. 386; *United States v. Averette*, 19 U.S.C.M.A. 363, 41 C.M.R. 363.

³⁸ The court below asserted that these were the only two factors of the twelve listed in *Relford* that favored court-martial jurisdiction. We do not believe, however, that the “service connection” determination was to be made solely on a numerical basis, without giving due consideration to the relative importance or unimportance of each factor listed in *Relford*. In this regard, we would point out that because respondent's absence was not “proper” under the first factor, it would seem to follow that several other factors that might have pointed in the direction of non-service-connection had the absence been “proper” carry less weight: *i.e.*, the crime's commission “away from the base” (No. 2) and “at a place not under military control” (No. 3); the “absence of any connection between the defendant's military duties and the crime” (No. 6); and the “absence of any threat to a military property” (No. 11). Moreover, in view of the unauthorized absence, it is questionable whether it can be said here that there was an “absence of any flouting of military authority” (No. 9) (see p. 47, *infra*). And, because the crime was committed in time of war, it is not clear, as we show *infra*, pp. 44-45, that there was an “absence of any threat to the military post” (No. 10).

proach" that this Court used in *Relford* (401 U.S. at 366). Military tribunals both in this country and in England have throughout history exercised broad jurisdictional powers over servicemen for offenses (both military and civil) committed in time of war.³⁹ Throughout the Seventeenth Century struggle between the English Crown and Parliament over the Crown's expansion of court-martial jurisdiction during time of peace (see *Reid v. Covert, supra*, 354 U.S. at 24-26),⁴⁰ the jurisdiction of the military in wartime to try "soldiers or mariners" for the crimes of "murder, robbery, felony, mutiny, or other outrage or misdemeanor whatsoever" (Petition of Right, 1627, 3 Car. 1, c. 1) was not questioned.⁴¹

³⁹ See Winthrop, *Military Law and Precedents*, 18-19, 903-904 (1920 War Dept. Reprint); Duke and Vogel, *supra*, 13 Vand. L. Rev. at 441-443.

Military tribunals were introduced into England by William the Conqueror and his immediate predecessors during the latter part of the Eleventh Century. See Davis, *A Treatise on the Military Law of the United States* 13 (3d ed. 1913).

⁴⁰ See Winthrop, *supra* at 19-20; Duke and Vogel, *supra*, 13 Vand. L. Rev. at 443. And see our Brief in *O'Callahan* at 16-19.

⁴¹ Parliament protested vigorously in its Petition of Right the policy of Charles I whereby military law was to be enforced against servicemen committing the above crimes in time of peace "by such summary course and order * * * as is used in armies in time of war * * *." See *Reid v. Covert, supra*, 354 U.S. at 25. In 1688, James II issued articles of war for the governance of the standing army in time of peace, which included punishment for the non-military crimes of murder, robbery and theft. Articles of War of James II, Arts. XVII-XVIII, reprinted in Winthrop, *supra*, App. V, at 922. Parliament responded again—the Bill of Rights of 1689—which provided that standing armies in peacetime were unlawful without the consent of Parliament, and almost immediately thereafter consolidated its control with the first Mutiny Act, 1 W. & M., c. 4

Similarly, military practice in this country at the time of the ratification of the Constitution—which, as noted in *O'Callahan* (395 U.S. at 270), was largely reflective of the then prevailing British practice—indicates a general understanding that court-martial jurisdiction in time of war extended to the trial of soldiers for both military and non-military offenses. An examination of court-martial cases actually tried during the period reveals numerous instances of court-martial trials of servicemen for so-called “civilian” offenses. In an Appendix (pp. 49–56, *infra*) we are listing a number of these, including the crimes of simple assault of a civilian, drunkenness, rioting in town, fraud, and cashing a bad check in a civilian restaurant. Among the more serious offenses can be found housebreaking, theft (as charged in the instant case) and robbery.⁴²

In 1863, during the Civil War, Congress for the first time made specific provision in the Articles of (reprinted in Winthrop, *supra*, App. VI, at 929), providing for court-martial of soldiers in time of peace, but specifically restricting the jurisdiction to the offenses of mutiny, sedition and desertion. Significantly, however, Parliament imposed no limitation then or later (see our Brief in *O'Callahan* at pp. 18–19) on the offenses triable by court-martial in time of war. See Duke and Vogel, *supra*, 13 Vand. L. Rev. at 444; Davis, *supra*, at 3.

⁴² This Appendix contains a partial list of the offenses we summarized in the Appendix to our Brief in *O'Callahan*. The majority's opinion in *O'Callahan* distinguished the court-martial convictions in these Revolutionary War cases on the ground that “those courts-martial held between 1773 and 1783 were for the trial of *acts committed in wartime* and, given the pattern of fighting in those days, in the immediate theater of operations” (395 U.S. at 270, n. 14; emphasis added).

War for the trials of non-military crimes during war-time.⁴³ The provision, contained within an enactment for the enrolling and calling out of national forces, was as follows (Act of March 3, 1863, ch. 75, § 30, 12 Stat. 731, 736):

That in time of war, insurrection, or rebellion, murder, assault and battery with an intent to kill, manslaughter, mayhem, wounding by shooting or stabbing with an intent to commit murder, robbery, arson, burglary, rape, assault and battery with an intent to commit rape, and larceny, shall be punishable by the sentence of a general court-martial or military commission, when committed by persons who are in the military service of the United States, and subject to the articles of war; and the punishments for such offenses shall never be less than those inflicted by the laws of the state, territory, or district in which they may have been committed.

Except for minor changes in 1874, removing the duty to surrender soldiers to civil authorities in time of war (Rev. Stat. 1342, Art. 59), the pertinent Articles were not further revised until 1916. At that time,

⁴³ Until then the general article (1775 Articles of War, set forth in Winthrop, *supra*, at 957) had been considered to provide the Army with an adequate basis for the exercise of such non-military criminal jurisdiction during wartime as might be necessary for the regulation of its small force. The Navy's authority in this regard derived from the Articles for the Better Government of the Navy (Act of April 23, 1800, ch. 33, 2 Stat. 45), which conferred jurisdiction over all naval personnel "while on shore" (2 Stat. 47, Art. XVII) and at sea (2 Stat. 48, Arts. XXI, XXIV, XXVI). See Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 Harv. L. Rev. 1, 13-15 (1958).

Congress for the first time made specific provision for peacetime court-martial jurisdiction over various enumerated non-capital offenses committed by members of the armed forces (39 Stat. 664, Arts. 92 and 93); the existing jurisdiction of military tribunals during wartime, however, was in no way curtailed (see our Brief in *O'Callahan* at pp. 21-23).

The provisions of the 1916 articles relating to jurisdiction over non-military offenses remained essentially the same until the enactment in 1950 of the Uniform Code of Military Justice, which is presently in effect. The only pertinent substantive changes effected by the Code were (1) the extension of court-martial jurisdiction in time of peace to the capital offenses of murder and rape committed within the United States (see Arts. 118, 120; 10 U.S.C. 918, 920), and (2) the modification of the provision calling for delivery of offenders to civil authorities so as to make such delivery discretionary under such regulations as the Secretary concerned may prescribe (Art. 14; 10 U.S.C. 814).

Viewed in its historical perspective, therefore, it seems clear that, as to members of the armed forces, the wartime court-martial power has consistently been regarded as plenary, embracing all offenses. There are strong policy considerations supporting that conclusion. During wartime, the need to maintain control, morale and discipline within the military community is far greater than in times of peace. Undeniably, "[t]he commission of offenses against the civil order manifests qualities of attitude and character equally destructive of military order and safety" (*O'Callahan*

v. *Parker*, *supra*, 395 U.S. at 281; Harlan, J., dissenting). It best serves the overriding interests of maintaining an efficient and effective wartime fighting force to permit such crimes to be tried by court-martial. See Nelson and Westbrook, *supra*, 54 Minn. L. Rev. at 61-62. Certainly during World War II the military had "a proper concern in keeping its own house in order, by deterring members of the armed forces from engaging in criminal misconduct on or off the base." *O'Callahan v. Parker*, *supra*, 395 U.S. at 282 (Harlan, J., dissenting).

Moreover, court-martial jurisdiction in the present context is responsive to another practical need of the armed forces, that is, the rehabilitation of offenders to return them to useful military service. Soldiers detained by civilian authorities before trial, or imprisoned thereafter, are of little use to the service. By contrast, confinement by the military offers an opportunity for rehabilitation, designed to return the offender to active duty as soon as possible. See Herrod, *The United States Disciplinary Barracks System*, 8 Mil. L. Rev. 35 (1960).⁴ During a war, of course, the restoration of offenders to military functions in this manner takes on added importance.

In view of the above, we believe that the "wartime" factor listed in *Relford* is entitled to considerably

⁴ The court of appeals dismissed this consideration by noting simply that respondent was not returned to active duty (Pet. App. 15, n. 12). It failed to mention, however, that the correctional authorities who had been given responsibility to "rehabilitate" respondent, did not return him to duty because, on the basis of his record during confinement, they concluded that he was not "good material for restoration" (App. 33-34).

more weight than it was assigned by the court of appeals. While we would argue that this factor alone is sufficient to establish court-martial jurisdiction, that need not be decided in this case.⁴⁶ For when the war-time aspect is considered along with the additional *Relford* factor here—absence without leave—there is certainly a sufficient military interest to bring respondent's crime of auto theft within the "service connected" category.

As pointed out by the court below (Pet. App. 14), an unauthorized absence is "a more serious breach of military duty and a greater threat to military discipline during wartime than in peacetime." If not dealt with swiftly and firmly so as to discourage servicemen from going AWOL, the result could be large-scale desertion on the eve of battle, perhaps seriously jeopardizing the fighting capabilities of the armed forces at a time when the need to maintain discipline and morale is greatest. For this reason, as Winthrop, *supra* at 608, notes:

The brief unauthorized absences of soldiers are, in time of peace, most commonly referred for trial to inferior courts by which they are usu-

⁴⁶ Several courts have already held that a single *Relford* factor may alone be determinative of court-martial authority, notwithstanding that all the other factors suggest that the crime was not "service connected." Thus the appellate courts have uniformly decided that where the offense did not occur within the United States (factor No. 4), the service-connection test is satisfied, since the alternative to a trial by court-martial is a trial by the foreign country. See *Gallagher v. United States*, *supra*; *Bell v. Clark*, 437 F.2d 200 (C.A. 4); *Hemphill v. Moseley*, 443 F.2d 322 (C.A. 10). And see *United States v. Keaton*, 19 U.S.C.M.A. 64, 41 C.M.R. 64.

ally visited with a small forfeiture of pay or other light sentence. The offense, however, * * * calls for a serious punishment * * * where the offense was committed in time of war, when, in the words of Attorney General Legaré, "the absence falls, in contemplation of law, little short of desertion."

The court of appeals discounted this consideration on the ground that the auto theft offense was a different crime that could not be "[swept] within the jurisdiction" (Pet. App. 14) of the military tribunals. We do not believe, however, that respondent's unauthorized absence from his post and his theft of the automobile can be so easily separated. Rather, the theft may be properly viewed as facilitating his efforts to get away from his post and avoid apprehension by increasing his mobility; thus, it could well be said to have been in furtherance of unlawfully remaining absent without leave. Such circumstances have long been considered relevant to the military offense of AWOL. See Winthrop, *supra*, at 638, listing in this context as significant factors bearing on the offense of unauthorized absence whether the accused took "a horse * * * or such other property * * * as may facilitate a rapid removal * * *," or took "passage on a railway train, steamer, or other conveyance for a distant point * * *."

In these circumstances, we think that respondent's theft of an automobile during his unlawful flight from the service was of sufficient concern to military authorities to support inclusion of that charge along with the AWOL charge in his court-martial. Because

it was committed in wartime, and in furtherance of a military offense that was itself considered to be particularly serious in time of war, the stealing of the car was, we think—unlike the wholly unrelated, peacetime offenses involved in *Gosa* and *Schlomann*—“service connected” within the meaning of *O’Callahan* and *Relford*.⁴⁶

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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⁴⁶ *United States v. Armes*, 19 U.S.C.M.A. 15, 41 C.M.R. 15, holding that the mere fact that a serviceman is improperly absent from base is not, without more, sufficient to establish a service-connection with respect to any offense committed during that absence, is not inconsistent with the result we urge here. There, the unauthorized absence was during peacetime and was thus recognized as a much less serious military offense.

APPENDIX

INSTANCES OF MILITARY PUNISHMENT FOR NON-MILITARY CRIMES, 1775-1783

There follows a summary of the instances where the military, during the period 1775 through 1783, assumed jurisdiction of apparently non-military criminal offenses committed by military personnel. The General Orders of Washington was used as the source. This summary does not purport to represent all of the courts-martial during this period since courts-martial were also convened by regimental commanders; the General Orders of these commanders are generally unavailable.

WRITINGS OF WASHINGTON

(Examined for the period from Washington's assumption of command at Cambridge in 1775 until the relinquishment of his commission in 1783)

1. H.Q., Cambridge, July 7, 1775 (Vol. 3, p. 317), "A General Court Martial to sit tomorrow, 10 O'Clock A.M. for the Trial of Thomas Raniely, charged with 'stealing'."

2. H.Q., Cambridge, July 29, 1775 (Vol. 3, p. 377). James Foster, Charge: "robbing Dr. Foster, Surgeon of the General Hospital."

3. H.Q., Cambridge, August 21, 1775 (Vol. 3, p. 439). Michael Berry, Charge: "stealing a hat from Capt. Waterman."

4. H.Q., Cambridge, September 24, 1775 (Vol. 3, p. 516). George Hamilton, "soldier in Capt. Dexters Company," Charge: "stealing a blue great coat, the property of Salomon Lanthorp."

5. H.Q., Cambridge, September 28, 1775 (Vol. 3, p. 524). John Hawkins and Robert Higgins, Charge: Theft ("upon appeal from a Regiment Court Martial").

6. H.Q., Cambridge, October 17, 1775 (Vol. 4, p. 35). Lt. Thomas Randell, Charge: "Stabbing a matross in the said regiment."

7. H.Q., New York, May 8, 1776 (Vol. 5, p. 24). Timothy Dawney, Charge: "attempting to stab Joseph Laffin, assaulting John Phipps, and for snapping a loaded musket at Luther Proute."

8. H.Q., New York, May 10, 1776 (Vol. 5, p. 32). Joseph Child of New York Train of Artillery, Charge: "defrauding Christopher Stetson of a dollar," and other charges.

9. H.Q., New York, May 10, 1776 (Vol. 5, p. 32). Zodiac Piper and Thos. Walkins, Charge: "being concern'd in a riot Saturday night."

10. H.Q., New York, May 22, 1776 (Vol. 5, p. 74). Andrew O'Brien, serjeant and William Welch, Corporal, Charge: "assaulting, beating, and dangerously wounding, one William Irvine."

11. H.Q., New York, June 2, 1776 (Vol. 5, p. 95). Hugh Killbreath, of Capt. Roose's Company, Charge: "assaulting, beating and wounding Assa Baker, and David Avery of the Artillery."

12. H.Q., New York, June 16, 1776 (Vol. 5, p. 106). Lt. Van-Hook, Charge: "beating Sally Paterson, an inhabitant of this town, on the head with a stick."

13. H.Q., New York, July 1, 1776 (Vol. 5, p. 209). William Hurly of Capt. Parks Company, Charge: "firing on and wounding without cause one Peter Child a citizen."

14. H.Q., New York, August 11, 1776 (Vol. 5, p. 411). Joseph Martin of Capt. Hurds Company, Charge: "abusing and robbing a woman in the market."

15. H.Q., New York, August 16, 1776 (Vol. 5, p. 441). David Astin of Col. Sillimans Regiment, Charge: "breaking open a store and stealing rum, molasses and fish."

16. H.Q., Morristown, April 7, 1777 (Vol. 7, p. 365). Lt. Carnes, Charge: "converting to his own use the property—viz: A horse and half Johannes, belonging to one Baxter."

17. H.Q., Morristown, April 17, 1777 (Vol. 7, p. 422). Lt. Costigan, Charge: "pressing a horse, the property of John Kidd Esqr. of Bucks County (Pennsylvania) appropriating him to his own use."

18. H.Q., Morristown, May 13, 1777 (Vol. 8, p. 59). Serjt. Hyliard, Serjt. Hallbrook, Corporal Smith, Philip Hendrick, and, Stephen Lee, Charge: "suspected of having robbed the house of Elias Bland."

19. H.Q., Morristown, May 13, 1777 (Vol. 8, p. 60). Joseph Bordon, Charge: "theft."

20. H.Q., Middle-Brook, June 13, 1777 (Vol. 8, p. 245). Alexander Brandon, Charge: horse stealing.

21. H.Q., Clove, July 18, 1777 (Vol. 8, p. 424). John Van Dyck, Charge: stealing three hundred dollars and desertion.

22. H.Q., near the Cross Roads, August 17, 1777 (Vol. 9, p. 88). Capt. Holmes, Charge: "Going into one Palmer's garden, tearing cucumbers from the vines and abusing and striking Dr. Smith."

23. H.Q., Valley Forge, January 28, 1778 (Vol. 10, p. 359). William Dearlove, Charge: "stealing money from Frederick Buzzard." Stephen Rice, Charge: "plundering the inhabitants of the county."

24. H.Q., Valley Forge, March 14, 1778 (Vol. 11, p. 83). Lieutt. Enslin, Charge: "Attempting to commit

sodomy with John Monhort a soldier & swearing to false accounts."

25. H.Q., Valley Forge, March 23, 1778 (Vol. 11, p. 133). Sgt. John Henry Leiders, Charge: "wounding with his sword one Henry Trautcher."

26. H.Q., Valley Forge, April 16, 1778 (Vol. 11, p. 266). Lieutt. Orr, Charge: "conniving with Serjeant Hughes in secreting stolen goods" and other charges.

27. H.Q., Valley Forge, May 29, 1778 (Vol. 11, p. 486). Captain Medaras, Charge: Forgery.

28. H.Q., Valley Forge, June 5, 1778 (Vol. 12, p. 22). Lieutt. McDonald, Charge: "taking two mares and a barrel of carpenter tools on the lines which mares he conveyed away and sold the tools at a private sale."

29. H.Q., Valley Forge, June 13, 1778 (Vol. 12, p. 54). Captain Henderson, Charge: "extorting a sum of money from Alexander Bayard an inhabitant of this state."

30. H.Q., Peramus, July 12, 1778 (Vol. 12, p. 172). Lieutt. West, Charge: "plundering the house of Mrs. Golf."

31. H.Q., White Plains, July 27, 1778 (Vol. 12, p. 242). Mrs. James Davidson, Quarter Master, Charge: "defrauding the soldiers," "embezzling Continental Property and disposing of several Articles belonging to the United States."

32. H.Q., White Plains, August 8, 1778 (Vol. 12, p. 299). John Armstrong, a Private, Charge: "stealing a key."

33. H.Q., White Plains, August 31, 1778 (Vol. 12, p. 375). Captain Ewell, Charge: "embezzling money the property of several soldiers" and "embezzling Cloathing belonging to the Public."

34. H.Q., White Plains, September 9, 1778 (Vol. 12, p. 415). Samuel Bond, Charge: "Picking a lock and breaking into a public store," and stealing.

35. H.Q., Fredericksburgh, October 23, 1778 (Vol. 13, p. 136). Hate-evil Colston of Col. Nixon's Regiment, Charge: "entering the house of Rueben Crosly an inhabitant of Fredericksburgh, by force of arms in company with one more, and taking from thence about three hundred dollars in Continental Money, one Musquet, one pair of plated Shoebuckles and sundry other articles."

36. H.Q., Fredericksburgh, October 23, 1778 (Vol. 13, p. 137). Glover, Goldsmith, and Lamb, soldiers, Charge: "plundering house of Daniel Burch of some Cash, sundry articles of wearing Apparel and Household Furniture." Glover was also charged with "stealing from inhabitants whilst encamped at White Plains & stealing from inhabitants on the march."

37. H.Q., Fredericksburgh, October 23, 1778 (Vol. 13, p. 138). Brown, Herrick, Herring, Walton, Charge: several specifications of breaking and robbing homes.

38. H.Q., Middle Brook, February 11, 1779 (Vol. 14, p. 99). Colo. Craige, Charge: "beating and otherwise illtreating Caleb Brokaw an Inhabitant of this state."

39. H.Q., Middle Brook, February 17, 1779 (Vol. 14, p. 102). Lieutenant William Jenkins, Charge: "embezzling public property."

40. H.Q., Middle Brook, April 22, 1779 (Vol. 14, p. 424). Zimmerman, Serjeant; Gray, Private; Fisher, Farrier; Lankford, Private; and Garner, Private; Charge: "committing sundry robberies on the good people of the United States."

41. H.Q., Middle Brook, May 18, 1779 (Vol. 15, p. 100). Carson, Garnick, Cane, Johnston, Hitchcock, Charge: "breaking into and robbing the house of Mr. Van Noorstrand an inhabitant."

42. H.Q., Camp Middle Brook, May 22, 1779 (Vol.

15, p. 131). Edward Hawkins, soldier, Charge: "at-tempting to fire on an inhabitant in the night" and other charges.

43. H.Q., Middle Brook, May 27, 1779 (Vol. 15, p. 163). Roger Finney, William Martin, Charge: "housebreaking & robbery."

44. H.Q., Middle Brook, May 30, 1779 (Vol. 15, p. 183). William Mackarun, soldier, Charge: "stealing horseshoes."

45. H.Q., Middle Brook, June 1, 1779 (Vol. 15, p. 207). William Scully, soldier, Charge: "entering forcibly into the house of Robert Dennis and robbing him of sundry goods, also stabbing William Cox with a bayonet."

46. H.Q., Moore's House, November 19, 1779 (Vol. 17, p. 137). Borough and Burges Rickets and Mullen as accessories; Charge: "assaulting the horse by shooting . . . robbing the owner . . . plundering his house."

47. H.Q., Morristown, January 3, 1780 (Vol. 17, p. 345). John Lewis, a soldier, Charge: "Stealing and being drunk on duty."

48. H.Q., Morristown, February 19, 1780 (Vol. 18, p. 34). Lieutenant Porter, Charge: "Unofficer, unsoldierlike, and villainous conduct upon Staten Island viz: robbing and plundering a woman of money."

49. H.Q., Morristown, March 13, 1780 (Vol. 18, p. 110). Bell, Powers, Brown, Justice, soldiers; Charge: "Plundering Mr. Bogart an Inhabitant near Paramus."

50. H.Q., Morristown, May 28, 1780 (Vol. 18, p. 434). Fry, Charge: "stealing beef, candles, rum, and meal."

51. H.Q., Pracaness, July 22, 1780 (Vol. 19, p. 224). Thomas Brown, Charge: "plundering the inhabitants" and "abusing a woman."

52. H.Q., Orangetown, August 14, 1780 (Vol. 19, p. 371). Henry Finn of Colonel Angell's regiment, Charge: "plundering the inhabitants" and "abusing a woman."

53. H.Q., Orangetown, August 20, 1780 (Vol. 19, p. 414). Jesse Hensley and Michael Bourk of the 4th Regiment of Light Dragoons, Charge: "Robbing the house of the widow Sarah Sanford."

54. H.Q., Tean Neck, August 29, 1780 (Vol. 19, p. 467). Philip Lankfitt and Richard Peters, Charge: "Robbing Joseph Wessells of sundry articles in the presence of said Wessell's wife."

55. H.Q., Steenrapia, September 12, 1780 (Vol. 20, p. 33). David Hall, a soldier, Charge: "Plundering an inhabitant of money and plate."

56. H.Q., Orangetown, September 27, 1780 (Vol. 20, p. 96). Rooney, Moore, Miller, Welch, soldiers, Charge: robbery.

57. H.Q., Totowa, October 13, 1780 (Vol. 20, p. 179). David Gamble, Charge: "possession of counterfeit money and desertion."

58. H.Q., New Windsor, February 18, 1781 (Vol. 21, p. 240). Major Reid, Charge: embezzling public property and other charges.

59. H.Q., near York, October 30, 1781 (Vol. 23, p. 301). Gilbert Otter, soldier, Charge: "Not doing his duty as a Centinel and with assisting robbing a french officer's Wagon."

60. H.Q., Newburgh, January 28, 1783 (Vol. 26, p. 73). Cowell, Shea, Jenks, Blake, Creaton, Curtis, Urann, Cook, Woods, Goodrich, Charge: killing a cow, stealing fowls, and stealing geese.

61. H.Q., near York, November 3, 1781 (Vol. 23, p. 320). William Timmans, Charge: "Marauding, and burning the houses of different inhabitants of State of Maryland."

62. H.Q., near York, November 3, 1781 (Vol. 23, p. 322). Abraham Erwin, Charge: "Marauding in one of the barges in Chesapeake bay," and other charges.

63. H.Q., near York, November 3, 1781 (Vol. 23, p. 323). Sgt. Selkirk and James Steel, Charge: "robbing a french officer's wagon at Yorktown."

64. H.Q., Verplanks Point, September 13, 1782 (Vol. 25, p. 155). Ensign Bloodgood, Charge: "taking money out of the drawer in the barroom of the widow Charity Jacobus in a clandestine manner" and failing to clear his reputation among the officers of his regiment when charged with the same.

65. H.Q., Verplanks Point, October 11, 1782 (Vol. 25, p. 252). William Taylor, soldier, Charge: desertion and forgery.

66. H.Q., Newburgh, November 23, 1782 (Vol. 25, p. 368). John Abel, John Cogden and Philip King, soldiers, Charge: "being out of camp at an unreasonable hour and killing an ox belonging to an inhabitant."

67. H.Q., Newburgh, February 21, 1783 (Vol. 26, p. 149). Major Reid, Charge: Defrauding the United States and "embezzling public money."

68. H.Q., Newburgh, March 1, 1783 (Vol. 26, p. 174). Ensign James Sawyer, Charge: assault and robbery of a fellow officer and other charges.

69. H.Q., Friday, March 7, 1783 (Vol. 26, p. 197). Lt. Freeman, Charge: assault upon and theft from a fellow officer.

70. H.Q., Newburgh, April 15, 1783 (Vol. 26, pp. 321, 322). Ensign Herring, Charge: Embezzling public funds and stealing shirts from the common store.

OCT 11 1972

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1972

No. 71-1398

JOHN W. WARNER, Secretary of the Navy,
Petitioner,

v.

JOHN W. FLEMINGS,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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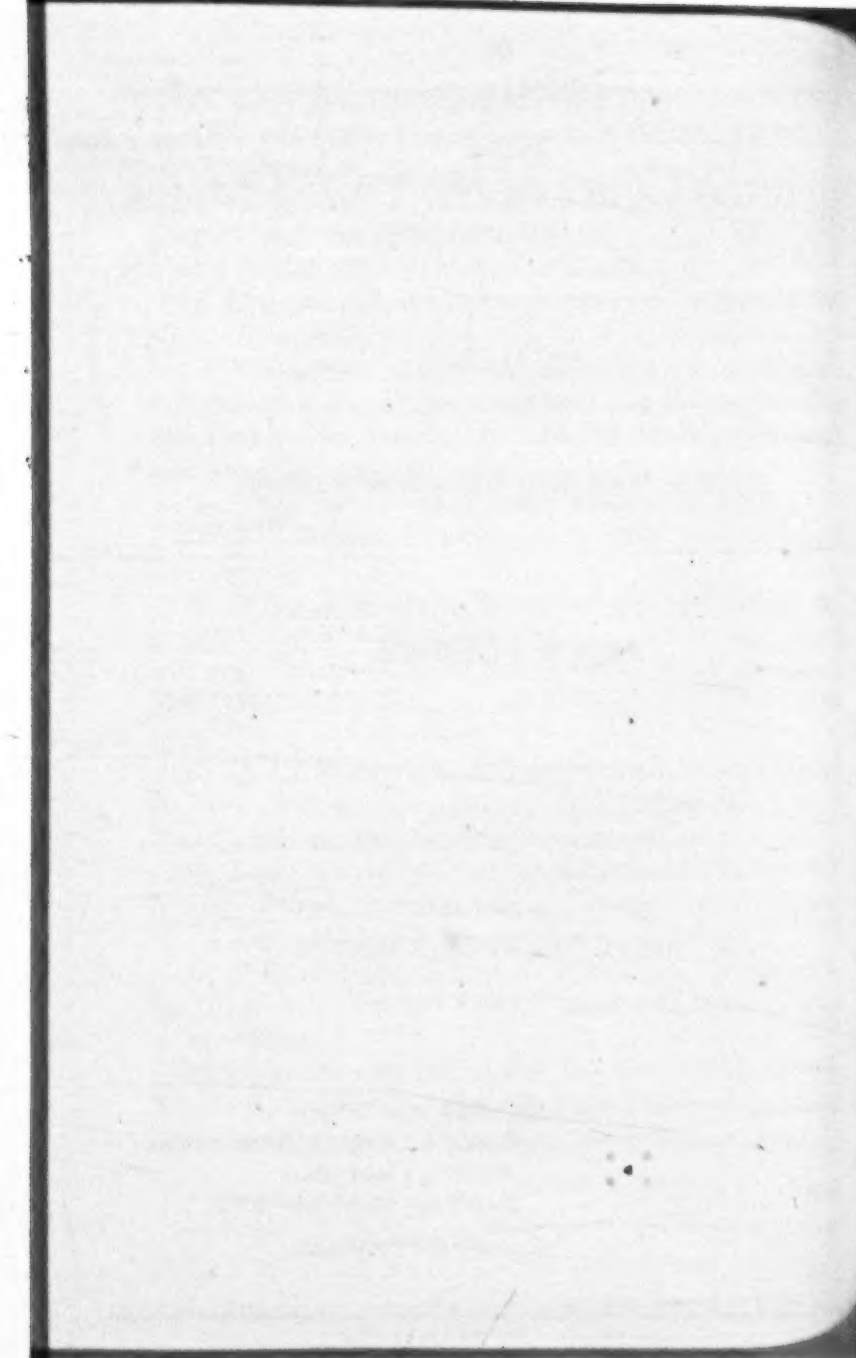


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IN THE
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OCTOBER TERM, 1972

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v.

JOHN W. FLEMINGS,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

On October 7, 1970, respondent John W. Flemings filed a verified *pro se* petition, designated "Complaint for a Mandatory Injunction," in the United States District Court for the Eastern District of New York seeking relief with respect to a 1944 court-martial conviction for theft

of an automobile. Respondent alleged, *inter alia*, that he had been denied due process of law because the "Military Tribunal in this case, was invalid and void [sic] without jurisdiction to proceed" (A. 5). Respondent also alleged that he was denied the opportunity to confront his accusers and denied assistance of counsel. He prayed that the court "in due consideration of the merits set forth herein by a layman . . . entertain the foregoing petition as being the appropriate remedy . . . and order . . . said procedures . . . void, *ab initio* and without jurisdiction. . . ." (A. 9.)

On January 29, 1971, the Secretary of the Navy, by counsel, filed a verified answer generally denying the allegations of the complaint but admitting certain facts as to the time, nature, and circumstances of the respondent's 1944 court-martial.

On the basis of the complaint, the answer, and military records and affidavits presented by the parties, it appears that respondent joined the United States Navy at the age of eighteen on May 11, 1944. Upon the completion of his boot camp training at Great Lakes Naval Station in Illinois, he was sent to an ammunition depot at Earle, New Jersey. While serving at the depot, respondent was issued a pass for a 72-hour leave, due to expire on or about August 7, 1944 (A. 16). He did not return to his post and on or about August 18, 1944, respondent was arrested by Pennsylvania State Police (A. 31).

Respondent alleged that he was picked up by a sailor while hitchhiking outside Norristown, Pennsylvania. Flemings was dressed in civilian clothes at the time. Arriving in Lewiston, Pennsylvania, the sailor asked

respondent if he had any money as the car was low on gas; respondent informed the sailor that he was without funds. The sailor said he did not have any money either but that there were two spare tires in the trunk of the car and that he would trade them for gas. The sailor found a gas station and the trade was made.

At dusk, the sailor stopped in front of a farm house along the road; informed respondent that he was going into the house to see if a friend was home, and said that he would be right back. While Flemings awaited the sailor's return, two state troopers stopped by the parked car and one asked Flemings what he was doing. While respondent spoke to them, the second trooper, who had apparently stayed in the patrol car, "observed the unknown sailor hightailing up a hill behind the said house." (A. 4.)

The troopers took respondent to their barracks in Hollidaysburg, Pennsylvania, where respondent alleges that he first learned the car was stolen. The automobile, a 1942 Chevrolet sedan, owned by one Earnest Bush, was stolen from a city street in Trenton, New Jersey, on August 18, 1944.¹

After questioning respondent, the troopers took him to the gas station (where the tire trade allegedly was made) in order to obtain a statement from the attendant as to who was driving the car and who made the deal for the trade of the tire. According to respondent, the attendant gave the troopers a statement and an affidavit corroborating his story.

¹Flemings was ultimately charged with theft of the vehicle of "a civilian" (A. 17), but the investigation of respondent's present counsel has determined that Bush was in the military at the time, although the vehicle in question was used for no military purpose (A. 50).

Respondent was eventually returned to his base at Earle, New Jersey, where he was confined. From there, plaintiff was taken to Harts Island, New York. After being detained for approximately five weeks at Harts Island, he was taken to the Brooklyn Naval Yard where court-martial proceedings were held. Respondent claims that on the advice of his Navy "counsel," a Lt. Folly, that he would obtain a light sentence, he entered a plea of guilty to charges of automobile larceny and being absent without leave for 13 days. In respondent's words,

During the interview, he [Lt. Folly] advised me to enter a plea of guilty to the said charge because I would only get a "moderate sentence" instead of ten years; plus, the fact that the weight of the evidence was against me.

Thereafter I was carried back to the Brooklyn Naval Yard to stand trial. (A. 4-5.)

Navy records appended to the Secretary of the Navy's answer, and not controverted, show that respondent was tried by a general court-martial at the Brooklyn Naval Yard, New York, on October 2, 1944; that he had the assistance of "counsel"; that he pled guilty to both charges; that he did not make a statement; that he was found guilty on his pleas; and that he was sentenced to three years' incarceration, loss of pay, and dishonorable discharge. After 26 months of confinement, respondent was released and dishonorably discharged.

On March 19, 1971, respondent moved for summary judgment. On April 22, 1971, the Secretary of the Navy cross-moved for summary judgment and moved to dismiss the complaint. Disposition of the motion was stayed pending exhaustion of military remedies by respondent. Subsequent to an unsuccessful attempt to obtain relief from the military, on July 19, 1971, the

district court granted Flemings' motion for summary judgment. The court determined that the offense of auto theft was not "service connected" within the meaning of *O'Callahan v. Parker*, 395 U.S. 258 (1969), and *Relford v. Commandant*, 401 U.S. 355 (1971); that a ruling limiting *O'Callahan* to prospective effect was not appropriate given the jurisdictional basis of the rule announced in *O'Callahan*; and that application of the principles governing the retroactive effect of decisions announcing new procedural rules likewise resulted in a retroactive application of *O'Callahan*. In the alternative, the court held that an independent constitutional right—trial in the vicinage—had been denied respondent. The matter was remanded to the Board for Correction of Naval Records with instructions to erase the conviction for automobile theft and dishonorable discharge and to enter a discharge of no greater disapprobation than bad conduct² (330 F. Supp. 193).

The Secretary of the Navy appealed, but the court of appeals affirmed the judgment of the district court. The court concluded that *O'Callahan* had set forth a jurisdictional rule which should be accorded full retroactive application. The court also agreed with the district judge that application of principles applied by this Court when considering the retroactivity of new rules of criminal procedure also led to a retroactive application of *O'Callahan*. Finally, the court of appeals held that the auto theft involved in this case was not service connected (458 F.2d 544).

²The maximum punishment for a thirteen day unauthorized absence was six months' confinement (plus the period of absence), loss of pay and allowances during a like period, reduction to the lowest enlisted pay grade and a bad conduct discharge (330 F. Supp. at 194).

SUMMARY OF ARGUMENT

In *O'Callahan v. Parker*, 395 U.S. 258 (1969), this Court ruled that the constitutional power of Congress to vest jurisdiction in courts-martial is restricted to cases where the offense charged involves a paramount military interest. A fundamental principle of Anglo-American law requires that if a tribunal lacks jurisdiction over the subject matter or the parties, its purported judgments are void. The government has not called the Court's attention to any case involving the jurisdiction of a court of criminal jurisdiction which casts doubt upon this settled rule. Institutional considerations involving the differences between courts and legislatures suggest that in the absence of compelling circumstances the Court should not abandon the well established doctrine that the judgment of a court without jurisdiction is void. Cases which hold that a restricted class of new procedural rights are to be applied prospectively in no way authorize a court without adjudicatory power to convict. On the contrary, the position taken by the government in this case was rejected in *United States v. United States Coin and Currency*, 401 U.S. 715 (1971).

Application of the three factor test employed by this Court to determine the retroactivity of new procedural rules also compels a finding that *O'Callahan* applies to a 1944 Navy court-martial for an offense without substantial service connection. Although in many respects military justice now compares favorably with civilian justice, this was not the case when respondent was tried in 1944.

John W. Flemings was court-martialed at a time when court-martial procedures raised a clear danger of convicting the innocent. Prior to the enactment of the Uniform Code of Military Justice, "Americans in uniform

had been at the mercy of legal procedures little changed since before the Revolutionary War, procedures originally designed for mercenaries...." (115 Cong. Rec. S 6760-61 (Daily ed. June 19, 1969)). The fact finding body that confronted Flemings consisted of a panel of officers hand picked by the commanding officer who convened the tribunal and who not only had direct command authority over the members of the panel but normally evaluated the efficiency of panel members. In addition to this obvious opportunity for command influence, Flemings was confronted with an absence of the procedural protections normally associated with reliability and fairness. He had no right to peremptorily challenge any members of the panel, no right to legally trained counsel, and no right to trial in the vicinage. He was dependent on the prosecution for process to obtain evidence and witnesses. The convening authority was empowered to replace sitting members of the tribunal and to appoint new members during the course of the trial. A bare majority was sufficient for conviction. Challenges for cause were severely limited and Flemings had no right to demand that enlisted men be represented on the court-martial panel. In short, whatever the resolution of the retroactivity question with respect to post-Uniform Code cases, Flemings' case raises due process considerations of the highest order. Both courts below found those considerations compelling and their disposition should not be disturbed.

This Court's *O'Callahan* decision was foreshadowed in a line of cases restricting military jurisdiction. The government cannot claim that it relied on unrestricted court-martial jurisdiction prior to *O'Callahan*. Informal agreements between the Department of Defense and both state and federal prosecutorial officials resulted in the regular delivery of servicemen who committed civilian offenses to the civilian authorities.

8

The government offers insufficient evidence that retroactive application of *O'Callahan* will have an adverse effect on the administration of justice. The military courts have applied *O'Callahan* to cases on direct review. Approximately one percent of all general court-martial cases tried before *O'Callahan* and appealed to the military courts between June 2, 1969 and December 31, 1970, contained offenses that were not service connected. Government officials have conceded that few successful petitions for review have resulted from *O'Callahan*. There are, therefore, few, if any, men presently confined who are entitled to relief under *O'Callahan*.

The overwhelming majority of all off-post criminal cases involving servicemen have been tried in the federal or state courts. Of the remainder, many are plainly service connected, thereby not raising *O'Callahan* issues, because they took place on a military post, outside the United States, or because the offense itself was plainly service connected. Thus relatively few cases will raise *O'Callahan* issues in order to obtain correction of military discharge status. These cases fall within the jurisdiction of military boards of correction; such problems as arise from application of *O'Callahan* to old cases will be handled on an administrative basis by agencies set up by Congress to adjust discharge status.

The judgment of the court below should also be affirmed on the ground that respondent was denied his right, guaranteed by Article III, Section 2, Clause 3, to trial in the vicinage. Respondent was taken from the state where the alleged offense took place to another state for trial. At the time, a Navy court-martial could not subpoena civilian witnesses from outside the state where the court was sitting. The district court found that

removal of the trial from the vicinity of the alleged criminal act made it difficult, if not impossible, for respondent to mount a defense.

Flemings' offense of auto larceny was in no sense service connected. Of the twelve relevant factors enumerated by the Court in *Relford v. Commandant*, 401 U.S. 355 (1971), only two would arguably support a conclusion that military jurisdiction was justifiable. The Court of Military Appeals has squarely held that one of the two factors—the fact that the offender was absent without leave—is insufficient to create military jurisdiction for a civilian offense which took place while the serviceman was absent. The military plainly has the power to protect its special needs by punishing the offense of absence without leave. Nor does the record contain evidence supporting the government's suggestion that there might be a connection between the car theft and Flemings' absence from his post.

Flemings was convicted of auto theft during wartime but his offense had no effect on the war effort and was in no way connected to the special wartime needs of the military. The civilian courts were open and able to dispose of the offense. This Court has often expressed a preference for civilian disposition in such circumstances. The military interest in exercising court-martial jurisdiction is greater in wartime, but the rule that the government seeks will mean that all offenses by servicemen are service connected if committed in wartime, regardless of the circumstances of the offense or the character of military operations. Such a result is totally contrary to the spirit of *O'Callahan* and *Relford*.

ARGUMENT

I.

**THE LOWER COURTS CORRECTLY APPLIED
O'CALLAHAN v. PARKER RETROACTIVELY TO
VOID RESPONDENT'S COURT-MARTIAL CON-
VICTION FOR AUTO THEFT.**

This case raises the question of the application of *O'Callahan v. Parker*, 395 U.S. 258 (1969) to a court-martial conviction finalized prior to the date of decision in *O'Callahan*—June 2, 1969. Both the district court and the court of appeals concluded that John W. Flemings was entitled to challenge his 1944 court-martial conviction for automobile theft. They held that *O'Callahan* must be applied retroactively because it was grounded in the absence of jurisdiction to adjudicate and that the government had failed to present reasons sufficient to justify departure from the "fundamental" rule of "our common law jurisprudence" that convictions rendered by a court lacking either personal or subject matter jurisdiction are void. (458 F.2d at 550.) Additionally, as a separate and independent ground supporting their judgments, both courts held that application of criteria formulated to determine the retroactivity of new procedural rules required that *O'Callahan* be given retroactive effect.

In the courts below, the parties disagreed as to whether *O'Callahan* decided that military tribunals lacked adjudicatory power over servicemen's offenses which were not "service connected." Flemings contended that his court-martial lacked power over the subject matter and over his person because Congress had had no constitutional power to vest it. The government argued that *O'Callahan* decided that "the lack of grand and petit

jury procedures (and perhaps other civilian court protections) resulted in the loss of jurisdiction otherwise within the control of government to grant." *Gosa v. Mayden*, 450 F.2d 753 (5th Cir. 1971), *cert. granted*, June 19, 1972, No. 71-6314.

The government appears to have abandoned this position. Nevertheless, the government's present position with respect to the basis of *O'Callahan* is not free of doubt. As respondent argues that there is "no basis for concluding that this case fits within the same mold as *Mapp* and others where convictions were overturned not because the trial court lacked adjudicatory power, but because procedures were constitutionally defective. . . ." (458 F.2d at 550.), discussion of the precise basis of the *O'Callahan* decision is appropriate.

O'Callahan involved an inquiry into the extent of the power granted Congress by Article I, Section 8, Clause 14 to vest courts-martial with jurisdiction over crimes committed by servicemen. The Court reasoned that a "court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved." (395 U.S. at 265.) While a system of specialized military courts, in which all the constitutional safeguards normally afforded citizens of the United States charged with crime are not provided, may be necessary to protect the effectiveness of the military, "the justification for such a system rests solely on the special needs of the military." (*Ibid.*) Consequently, the jurisdiction of courts-martial is constitutionally limited to conduct which creates a special need for military disciplinary action.

As the court of appeals emphasized, *O'Callahan* "did not 'reform' court-martial procedures or suggest that

current procedures are inadequate in trials for offenses which are service connected. Nor did the Court suggest that courts-martial constitutionally could assume jurisdiction over offenses which are not service connected if they provide the protective benefits of grand jury indictment and trial by jury." (458 F.2d at 550.) *O'Callahan* was "a proceeding challenging the jurisdiction of a court-martial. . . . Its major thrust is directed to the *basic differences between systems* of military and civilian courts rather than a few defects of procedure." (*Flemings v. Chafee*, 330 F. Supp. 193, 196 (E.D. N.Y. 1971)(emphasis supplied).)

Certainly, *O'Callahan* relied upon procedural deficiencies in the courts-martial³ but it did so "primarily as illustrative of these fundamental differences" between "systems of . . . courts" with different purposes. A fair reading of *O'Callahan* supports the conclusion that the Constitution rigidly differentiates between Article III courts and courts-martial because "a system of military justice . . . [has] fundamental differences from the practice in the civilian courts" (395 U.S. at 262):

It still remains true that military tribunals have not been and probably never can be constituted in such a way that they can have the same kind of qualifications that the Constitution deemed essential

³The "constitutional stakes" in *O'Callahan* were not limited to trial by jury, as is suggested by the government. This Court's decision enumerated several respects in which civil and military courts were distinct, calling attention to:

differences with respect to tenure of judges and command influence . . . differences in the access of the defense to compulsory process . . . differences in evidence and procedure. . . . (330 F. Supp. at 196.)

to fair trials of civilians in federal court. For instance, the Constitution does not provide life tenure for those performing judicial functions in military trials. (*O'Callahan, supra* at 262-3.)

* * * * *

The presiding judge at a court-martial is not a judge whose objectivity and independence are protected by tenure and undiminished salary and nurtured by the judicial tradition, but is a military law officer. Substantially different rules of evidence and procedure apply in military trials. (*Id.* at 264.)

An examination of this Court's opinion in *O'Callahan* demonstrates further that the Court's "use of the term jurisdiction, in context, denotes lack of power over the subject or person" (*Flemings, supra*, 330 F. Supp. at 196). Judge Weinstein noted the following language in *O'Callahan*, which strongly suggests that it is a jurisdictional case in the classic sense:

The fact that courts-martial have no *jurisdiction* over nonsoldiers, whatever their offense, does not necessarily imply that they have unlimited *jurisdiction* over soldiers, regardless of the nature of the offenses charged. (395 U.S. at 267 (emphasis supplied).)

* * * * *

Status is necessary for *jurisdiction*; but it does not follow that ascertainment of status completes the inquiry, regardless of the nature, time, and place of the offense. (*Ibid.* (emphasis supplied).)

* * * * *

The *jurisdiction* of British courts-martial over military offenses which were also common-law felonies was from time to time extended, but, with the exception of one year, there was never any general military *jurisdiction* to try soldiers for

ordinary crimes committed in the British Isles. (395 U.S. at 269 (emphasis supplied).)

* * * * *

In 1950, the Uniform Code of Military Justice extended military *jurisdiction* to capital crimes. . . . (*Id.* at 272 (emphasis supplied).)

* * * * *

We have concluded that the crime to be under military *jurisdiction* must be service connected. (*Ibid.* (emphasis supplied).)

This Court itself, in *Relford v. Commandant*, 401 U.S. 355, 356 (1971), referred to the *O'Callahan* holding as follows:

By a five-to-three vote, the Court held that a court-martial *may not try* a member of our Armed Forces charged with attempted rape of a civilian, with housebreaking, and with assault with intent to rape, when the alleged offenses were committed off-post on American territory, when the soldier was on leave and when the charges could have been prosecuted in a civilian court. (Emphasis supplied.)

The *Relford* characterization of the *O'Callahan* holding strongly suggests that the power of the court-martial was at issue, not simply the right to jury trial.

Finally, *O'Callahan* succeeded and relied upon a line of cases limiting the adjudicatory power of courts-martial. All of these cases discuss the authority of courts-martial in jurisdictional terms:

We do not write on a clean slate. The attitude of a free society toward the *jurisdiction* of military tribunals—our reluctance to give them authority to try people for non-military offenses—has a long Constitutional history. *Lee v. Madigan*, 358 U.S. 228, 232 (1958) (emphasis supplied).

* * * * *

Free countries of the world have tried to restrict military tribunals to the narrowest *jurisdiction* deemed absolutely essential to maintaining discipline among troops in active service. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 22 (1955). (Emphasis supplied.)

* * * * *

For no matter how practical and how reasonable the *jurisdiction* might be, it still cannot be sustained if the Constitution guarantees to these Army wives a trial in an Article III court. . . . *Reid v. Covert*, 354 U.S. 1, 74 (1957). (Emphasis supplied.)

In sum, *O'Callahan* dealt with differences between systems of justice. Absence of trial by jury and compulsory process, difference in evidence and procedures, tenure of judges, and command influence were considered by the Court as illustrating the fundamentally different purpose of the two systems. Time and time again, the opinion adverts to jurisdiction in terms which, as the district court noted, evidence that the word implies a lack of power over the subject or person. Even Mr. Justice Harlan's dissenting opinion viewed the "jurisdiction" involved in *O'Callahan* as the power to adjudicate, and formulates the question involved as whether the grant of jurisdiction to military courts has exceeded the reach of Congressional power. (395 U.S. at 274.) In *Gosa, supra*, the Fifth Circuit agreed that *O'Callahan* was a jurisdictional case in the classic sense and based its conclusion on the reasoning of Judge Weinstein's opinion in the present case.⁴

⁴[W]e find the reasoning of *Flemings* persuasive on this issue. Read with an open mind, *O'Callahan's* foundation, framework, and structure deny to the legislation which breathed the breath of judicial life into the forum that tried Sgt. *O'Callahan*, the necessary basis in constitutional power to reach this type of case. (450 F.2d at 757.)

The *Gosa* court, however, found that *O'Callahan* could be denied retroactive effect by virtue of the application of the three factor test that this Court has applied to non-jurisdictional rules. We argue, *infra* pp. 25-48, that the courts below correctly concluded that the proper application of this test results in the retroactive application of *O'Callahan*, but Flemings believes that this Court properly rests a finding of retroactivity on the jurisdictional nature of *O'Callahan*.

The government appears to contend that even conceding that Flemings' court-martial lacked adjudicatory power the fact that this Court did not so rule until 1969 renders the jurisdictional defect insignificant. The Court is asked to ignore the long and rich history of the doctrine that a criminal adjudication rendered by a tribunal without jurisdiction is illegal and void because otherwise it will "pretend" that the law is "discovered" rather than "evolves."

Surely the government has a heavy burden of persuasion in asking the Court to discard such a long accepted aspect of our jurisprudence. If judicial decisions are to be perceived as governed by law, rather than attributed to the shifting opinions of judges, institutional considerations require that retroactivity be the general rule. It requires no slavish acceptance of the ancient view that the law is "found" rather than "made" to conclude that prospective decision-making is dangerous; a process in which unless absolutely necessary only the legislature, not the courts, should indulge.

The Court recognized this in *Linkletter v. Walker*, 381 U.S. 618, 628 (1965), when it authorized limitation of a decision to prospective effect only "where the exigencies of the situation require" and "in the interest of justice."

As Professor Mishkin has written, prospectivity "seems to involve an arbitrariness which is normally seen as inconsistent with judicial action."⁵ See *Adams v. Illinois*, 405 U.S. 278 (1972) (opinion of Douglas, J., and Marshall, J.); *Mackey v. United States*, 401 U.S. 667, 675, 679 (1971) (opinion of Harlan, J.). The very arbitrariness of particular cut-off dates chosen in prospectivity cases, coupled with the widely accepted belief that several prospectivity decisions were, in fact, solely based on practical considerations, creates an appearance of courts acting as legislative bodies when decisions as to retroactivity are confronted—with all the potential strain that such an appearance creates. The strain will be all the greater if the government's position in this case is sustained, for this Court has never before "applied new rules announced in habeas corpus cases retroactively" (458 F.2d at 556).

There are, of course, constitutionally acceptable occasions for the invocation of the power to restrict the retroactive effect of judicial decisions, but this is a power to be used sparingly. Although the symbol of impartial and impersonal fidelity to pre-existing law is not always accurate, abandoning it in favor of a general power of non-retroactive overruling would put the courts in the highly undesirable and politically vulnerable posture of

⁵Prospective law-making is generally equated with legislation. Indeed the conscious confrontation of an effective date . . . smacks of the legislative process; for it is ordinarily taken for granted . . . that judicial decisions operate with inevitable retroactive effect. Beyond that, explicit treatment of the question, particularly if a definite time is set for transition from one rule to another highlights the fact that the court has changed the law. Mishkin, *Foreward: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 65, 66 (1965).

overtly legislating. See Schwartz, *Retroactivity, Reliability and Due Process*, 33 U. of Chi. L. Rev. 719, 720 (1966). An extension of the ambit of prospective-only decisions would, moreover, weaken the capacity of the courts to frame general rules of decision:

A theory of selective retroactivity raises the spector of continuous controversy over the soundness of its application. (Schwartz, *id.* at 724.)

Given the "strong tendency to universalize ethical judgments, any application of different rules to persons similarly situated—when the rules embody ethical values—tends to impair the image of justice, and to undermine public confidence in the administration of law and the rule of law itself." Currier, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 Va. L. Rev. 201, 239 (1965). Far from mechanically applying the traditional rule of retroactivity, as the government characterizes the decision of the court below, the court of appeals responded to institutional considerations of the highest order.

Until the ruling in *Linkletter v. Walker* (381 U.S. at 628) that the Court "may in the interest of justice make the rule prospective . . . where the exigencies of the situation require such an application . . .", new constitutional decisions had consistently been applied retroactively. *Linkletter* conceded that "heretofore, without discussion, we have applied new constitutional rules to cases finalized before the promulgation of the rule." At common law "[t]here was no authority for the proposition that judicial decisions made law solely for the future" (*Id.* at 622, 628).

Both common law and American traditions reserved a special place for jurisdictional transgressions, *Ex parte Siebold*, 100 U.S. 381 (1879); *Ex parte Reed*, 100 U.S. 13 (1879); *Developments in the Law of Habeas Corpus*, 83 Harv. L. Rev. 1038, 1209 (1970).⁶ If a body lacked jurisdiction over the subject matter or the parties, its purported judgments were void. A decision of a court without jurisdiction could no more be allowed to stand than a decision of a kangaroo court. In *McClaughry v. Demings*, 186 U.S. 49 (1901), for example, a volunteer officer was tried by a Regular Army court-martial despite the fact that the Articles of War expressly forbade a Regular Army court-martial. Even though the court sat in a military courtroom with all the accessories necessary for a valid trial, this Court voided the conviction saying:

His consent could no more give jurisdiction to this court, either over the subject-matter or over his person, than if it had been composed of a like number of civilians. . . . (*Id.* at 66.)

When, beginning with *Linkletter*, the Court denied retroactivity to cases in which courts "failed to exercise their power in a proper manner" (*Flemings, supra* 330 F. Supp. at 195), it said nothing which implied that a court without adjudicatory power could convict. A review of the cases in which this Court has held new constitutional rulings non-retroactive strongly suggests that the Court has limited the application of this power to a particular class of procedural decisions.⁷ None of these cases, of

⁶According to Bacon: "If the commitment be against the law, as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the courts are to discharge." IV Bacon, Abridgment of the Law, Habeas Corpus 585.

⁷For example, *Linkletter v. Walker, supra*, dealt with illegal searches by the police, *Mapp v. Ohio*, 367 U.S. 643 (1961); *Tehan*

course, touch the question of the adjudicatory authority of the lower court:

Generally, prospectivity has been used when a court with apparent jurisdiction has utilized some procedure or evidence theretofore thought proper. . . . By contrast, the question of lack of subject-matter jurisdiction has been considered unwaivable—to be raised at any point in the litigation and on the court's own motion. (*Flemings*, *supra* 330 F. Supp. at 201.)

The Court, moreover, has declared the denial of certain rights to be so prejudicial to the defendant that new

v. Shott, 382 U.S. 406 (1966), holding *Griffin v. California*, 380 U.S. 609 (1965), prospective, involved comments by the prosecutor and/or judge; *Johnson v. New Jersey*, 384 U.S. 719 (1966), held that *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Escobedo v. Illinois*, 378 U.S. 478 (1964), only applied to confessions used in trials begun after the date of those decisions; *Stovall v. Denno*, 388 U.S. 293 (1967), held the identification rules set up in *Gilbert v. California*, 388 U.S. 263 (1967), and *United States v. Wade*, 388 U.S. 218 (1967), to be prospective; *Duncan v. Louisiana*, 391 U.S. 145 (1968), and *Bloom v. Illinois*, 391 U.S. 194 (1968), dealing with the accused's right to trial by jury, were held prospective in *DeStefano v. Woods*, 392 U.S. 631 (1968). *Lee v. Florida*, 392 U.S. 378 (1968), and *Katz v. United States*, 389 U.S. 347 (1967), which involved illegal interception of letters and wiretapping, were declared prospective in *Fuller v. Alaska*, 393 U.S. 807 (1968), and *Desist v. United States*, 394 U.S. 244 (1969). In *Williams v. United States*, 401 U.S. 646 (1971), the Court declined to hold *Chimel v. California*, 395 U.S. 752 (1969), retroactive. In *Adams v. Illinois*, 405 U.S. 278 (1972), the Court declined to hold *Coleman v. Alabama*, 399 U.S. 1 (1970) retroactive. The *Mapp*, *Escobedo*, *Miranda*, *Gilbert*, *Wade*, *Lee*, *Chimel*, and *Katz* decisions dealt only with the admissibility of evidence. Neither *Coleman*, *Duncan* nor *Bloom* questioned the right of the courts to try the defendant, only the necessity of counsel at preliminary hearings, or of providing jury trial in those courts.

rulings must be retroactive. In cases involving right to counsel (*Gideon v. Wainwright*, 372 U.S. 335 (1963); *Douglas v. California*, 372 U.S. 353 (1963); *Mempa v. Rhay*, 389 U.S. 128 (1967)), use of a co-defendant's confession (*Bruton v. United States*, 391 U.S. 123 (1968)), and exclusion of jurors opposed to the death penalty (*Witherspoon v. Illinois*, 391 U.S. 519 (1968)), the Court rejected prospectivity because of the effect of the prior rule on the fact-finding process. The court of appeals thought that "if some decisions which were not based upon concepts of jurisdictional competence have been applied retroactively . . . *a fortiori* a case which rests on lack of jurisdiction in the traditional sense and seeks to preserve the basic integrity of the institutions which enforce our criminal laws, must be so applied." (458 F.2d at 551.)

In *United States v. United States Coin and Currency*, 401 U.S. 715, 723 (1971), the Court found a new rule retroactive because it dealt with conduct that could not "be punished in the first instance":

Unlike some of our earlier retroactivity decisions, we are not here concerned with the implementation of a procedural rule which does not undermine the basic accuracy of the fact-finding process.

Indeed this conclusion follows *a fortiori* from those decisions mandating the retroactive application of those new rules which substantially improve the accuracy of the fact-finding process.

In *Coin*, the Court decided that *Marchetti v. United States*, 390 U.S. 39 (1968), and *Grosso v. United States*, 390 U.S. 62 (1968), reversing convictions because of the unconstitutionality of the underlying law, applied retroactively to bar a forfeiture of gambling receipts:

In the case before us, however, even the use of impeccable factfinding procedures could not legitimate a verdict decreeing forfeiture, for we have held that the conduct being penalized is constitutionally immune from punishment. No circumstances call more for the invocation of a rule of complete retroactivity. (401 U.S. at 724-26.)

O'Callahan v. Parker involves an analogous situation for it is based on unconstitutionality of the law which gives the court-martial jurisdiction over the crime. Following *Gosa v. Mayden, supra*, the government attempts to distinguish *O'Callahan* from *Coin* by arguing that the latter involves

A form of conduct that could not have been constitutionally punished at any time from and after the date of the Bill of Rights. (*Gosa*, 450 F.2d at 758.)

While allegedly the issue in *O'Callahan*

is not whether the accused could be tried at all, but which forum had the right to conduct the proceedings. (*Id.* at 759.)

But this distinction is paper thin. The issue in *O'Callahan* was not merely "which forum had the right to conduct the proceedings," but whether or not "the accused could be tried at all" by the distinct and substantially different system of military courts. Certainly *Coin* and *O'Callahan* are far closer to each other than either is to the usual retroactivity case involving procedural rules. As Judge Weinstein read *Coin*, it involved a situation "closely akin to subject matter jurisdiction":

In *United States Coin* the conduct was immune from punishment in any court while in the instant case the conduct was punishable but not in this

particular court. Both cases involve the power—jurisdiction—to act. (*Flemings, supra* 330 F.2d at 202.)

In the same vein is *North Carolina v. Pearce*, 395 U.S. 711 (1969), holding retroactive the *Benton v. Maryland*, 395 U.S. 784 (1969), “incorporation” of the Double Jeopardy Clause of the Fifth Amendment in the Fourteenth without discussing the *Linkletter* doctrine.

The government unpersuasively attempts to analogize the difference between military and civil courts to the difference between state and federal courts. But military courts are a special system of justice, separate and apart from both federal or state judicial systems. The military courts do not, for example, have jurisdiction over a violation of either state or federal law, except within a sphere limited by the Constitution. This Court has consistently found that the military law system is not a part of the Article III judicial system.⁸

The government places its main reliance on a civil case, *Chicot County Drainage District v. Baxter State Bank*,

⁸It must be emphasized that every person who comes within the jurisdiction of a court martial is subject to military law—law that is substantially different from the law which governs civilized society. *Reid v. Covert*, 354 U.S. 1, 38 (1957).

* * * * *

[I]t had long been established that military tribunals are not part of our judicial system. *Duncan v. Kahanamoku*, 327 U.S. 304, 309 (1940); *Ex parte Vallandigham*, 1 Wall. 243 (1863).

* * * * *

We find nothing in the history or constitutional treatment of military tribunals which entitles them to rank along with Article III courts as adjudicators of people charged with offenses for which they can be deprived of life, liberty or property. (*O’Callahan, supra* at 262.)

308 U.S. 371 (1940). In *Chicot*, bondholders of a state drainage district who had been parties to a debt adjustment proceeding sought to recover on the original bonds on the ground that the statute authorizing the adjustment had been subsequently declared unconstitutional. In ruling against the bondholders, this Court explicitly confined "consideration to the question of res judicata ..." (*Id.* at 375). The Court barred the bondholders' suit because to do otherwise would have adversely affected the rights of neutral third parties who had innocently bought bonds under the approved debt adjustment plan. These subsequent bondholders had relied in good faith on the prior decision. Their property rights had vested. It would have been "strikingly unjust" (458 F.2d at 551), as well as totally inconsistent with settled principles of res judicata, to change their status

The present case is noticeably different. Respondent contends that the government transgressed constitutionally set jurisdictional limits when it convicted him of a criminal offense and subjected him to confinement and stigma. No innocent third party or vested private property rights would be adversely affected by retroactivity. As the court below put it: "*Chicot* was a civil proceeding concerned simply with whether a debt was still owing. Although the doctrine of finality bears an important place in the jurisprudence of criminal law . . . it is 'more firmly settled in the context of civil litigation.' " (458 F.2d at 551)

Nevertheless, Flemings does not contend that under no circumstances can the doctrine of *Linkletter* be applied to jurisdictional questions. Rather, he argues that the terms and conditions of such application "are among the most difficult of those which have engaged the attention of the courts," *Chicot County Drainage District, supra* at

308 U.S. 374, that such a step is so at odds with traditional ways of doing things and accepted perceptions of the nature of law, so fraught with fundamental institutional considerations, that this Court should not enter upon such a course unless plainly required by the "exigencies" to do so. (See the dissenting opinion of Judge Godbold in *Gosa, supra*, 450 F.2d at 767-69.)

This Court has not hesitated in the past to order the full retroactive application of decisions limiting the jurisdiction of courts-martial. *Kinsella v. Krueger*, 354 U.S. 1 (1957), involved the court-martial conviction of the wife of an Army colonel for a 1952 murder. Her military appeal became final on December 30, 1954. See *United States v. Kinsella*, 137 F. Supp. 806 (1956). Yet the Court applied its decision in *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), retroactively and permitted a writ of habeas corpus to issue. See also *Grisham v. Hagan*, 361 U.S. 278 (1960). Respondent submits that in the absence of compelling circumstances not shown by the government in this case the traditional policy governing the retroactivity of jurisdictional rules must be applied to *O'Callahan*.

II.

PRINCIPLES FORMULATED TO DETERMINE THE RETROACTIVITY OF NEW PROCEDURAL RULES REQUIRE THAT *O'CALLAHAN v. PARKER* BE HELD RETROACTIVE.

Should this Court determine that the jurisdictional basis of *O'Callahan* is not sufficient to mandate its retroactive application, it would be guided by those rules laid down in cases subsequent to *Linkletter, supra*, in determining whether the interests of justice require restriction of the decision to prospective application.

Those standards which have been most frequently applied are found in *Stovall v. Denno*, 388 U.S. 293, 297 (1967):

The criteria guiding resolution of the question [prospective application] implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.

A. The Purpose To Be Served by the New Principle

The most important of the three criteria is the first. When a rule's predominant purpose is to ensure the fairness of trial, the integrity of the fact finding process, or to avert a "clear danger of convicting the innocent," *Tehan v. Shott*, 382 U.S. 406, 416 (1966), the rule must be applied retroactively, regardless of reliance on the old standard or the effect of retroactive application of the new rule on the administration of justice. *Williams v. United States*, 401 U.S. 646 (1971); see also *Desist v. United States*, 394 U.S. 244 (1969).

The government, in support of its contention that *O'Callahan* did not question the reliability or fairness of court-martial adjudications, places primary reliance upon the refusal of the Court to apply jury trial cases, such as *Duncan v. Louisiana*, 391 U.S. 145 (1968), and *Bloom v. Illinois*, 391 U.S. 194 (1968), retroactively. See *DeStefano v. Woods*, 392 U.S. 631 (1968). The heart of the Court's rationale for such refusal, and the heart of the government's contention here, is contained in the following language from *Duncan, supra*:

We would not assert, however, that every criminal trial—or any particular trial—held before a judge

alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury. (391 U.S. 631, 633-34 (1968).)

But *Duncan*, *Bloom* and *DeStefano*, even read in the light most favorable to the government, simply do not control *O'Callahan's* retroactivity. *Flemings'* complaint is not directed to the identity of the body before which he was *not* tried, but rather to the nature of the body before which he *was* tried. He relies, in short, upon what the Fifth Circuit in *Gosa*, *supra*, called the *O'Callahan* right "to avoid numerous incidents and functions of military justice considered less satisfactory to the determination of guilt than procedures available in civilian courts" (450 F.2d at 763). *DeStefano* says nothing with respect to the "integrity" of the fact-finding system under which *Flemings* was tried, for he was not tried before a judge or in a civilian court.

Flemings was tried before a 1944 Navy court-martial, and, as we shall demonstrate, 1944 Navy courts-martial in no way resemble trial before a civilian judge. The many reforms of the Uniform Code of Military Justice, heavily relied upon by the government in this case, merely set in relief the character of courts-martial as they existed prior to the 1950 enactment of the Code. Respondent does not claim that without exception every adjudication by courts-martial as constituted prior to 1950 violated due process but he does contend that the procedures governing such courts-martial "raised a clear danger of conficting the innocent," *Tehan v. Shott*, 382 U.S. at 416, and "serious questions about the accuracy of guilty verdicts in past trials," *Williams v. United States*, 401 U.S. at 653.

An accused tried before a 1944 Navy court was tried by a body of officers hand-picked by the very official

who made the decision to prosecute, and hand-picked from among that officer's subordinates and underlings. One of the witnesses before a subcommittee of the House Armed Services Committee (now a distinguished federal judge), during the Committee's 1949 hearings on the proposed Uniform Code of Military Justice, compared such panels to a jury "appointed out of the sheriff's office or . . . appointed out of the public prosecutor's office. . . ." ⁹

If an accused tried for a non-service-connected crime was at the same time also charged with a service-connected crime (as in the present case), this group was hand-picked by the man who was in a very real sense the "victim" of the service-connected crime—the accused's commanding officer, whose orders had been flouted and whose disciplinary control over his unit were threatened by the accused's service-connected crime.

Before subordinate officers¹⁰ took their places as members of the court-martial panels, each had an ample opportunity to learn the views of his superior officer with respect to the offender and the offense.¹¹ Each knew

⁹Testimony of Fredrick van Pelt Bryan, Chairman, Special Committee on Military Justice of the Association of the Bar of the City of New York, and former deputy chief of staff of the Second Air Division of the Air Force. *Hearings on H.R. 2498 Before the Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess., at 630 (1949).

¹⁰As servicemen in 1944 did not have the right to demand that enlisted members be represented on a court-martial panel, the government's claim that a member of the armed services was entitled to a determination by a representative jury of his military peers is plainly insubstantial insofar as it relates to respondent Flemings.

¹¹The system of military justice laid down in the Manual for Courts Martial not infrequently broke down because of the denial to the courts of independence of action, in many instances by the

full well, for example, what his superior officer's views were about "coddling" of AWOL's. There was plenty of opportunity to express these views—at staff conferences, over morning coffee in the mess hall, and even around the bar at the officers' club.¹² Each officer took his place on the court-martial knowing that his own efficiency report, including, in 1944, that aspect of "efficiency" which related to performance as a court member, was to be judged by that same superior officer, the one who had preferred the charges and who was, in many cases, also the "victim."¹³

commanding officer who appointed the courts and reviewed their judgments; and who conceived it the duty of command to interfere for disciplinary purposes. Indeed, the general attitude is expressed by the maxim that discipline is a function of command. *Hearings on H.R. 2498, supra* note 9, at 634, 635. The quote is from the famous Vanderbilt Report.

¹²Testimony of Arthur E. Farmer, Chairman, Committee on Military Law of the War Veterans Bar Association:

When I was down at Camp Gordon and it was done in one instance very beautifully by putting the officer under arrest by written orders instead of the usual way which is by word of mouth.

The court could not have been more influenced if each and every officer was called before him and told, "Look, this man is guilty and make an example of him." In other instances, . . . there is a heart-to-heart discussion between the general and his operations staff officer.

They discuss the seriousness of the offense, in the hearing of a couple of other officers, and the Army grapevine which functions so beautifully goes into action, and every member of the court knows about it.

Hearings on H.R. 2498, supra, note 9 at 608.

¹³Consider the following:

(1) Testimony of Edmund M. Morgan, a prominent authority on military law, and one of the principal drafters of the Uniform Code of Military Justice: "For instance, Governor Gibson, of

In a civilian court, a defendant faced with a jury thought to be biased would have had available

Vermont, was very wroth at the treatment he had received as a member of a court-martial, being called in by the commanding officer and reprimanded. And when Mr. Gibson told him that he was a lawyer and that they could not tell him how to decide cases, that the choice was to get him off the court or let him use his conscience on the case, they got him off the court." *Hearings on H.R. 2498, supra* note 9, at 608.

(2) Testimony of George A. Spiegelberg, Chairman of the Special Committee on Military Justice of the American Bar Association:

... The present bill says that the unauthorized influencing of a court is prohibited.

Now if anybody will tell me or tell a commanding officer where the line is to be drawn between authorized and unauthorized influencing of a court, I would be very glad to have it. I do not know.

But I do know from experience in two wars that without violating a comma of Article 37 I, as a commanding officer, could get any verdict I wanted from any court chosen from my command.

When the Vanderbilt Committee interviewed among others 49 general officers—and I think my figures are accurate—16 of those general officers affirmatively and proudly testified that they influenced their courts.

They regarded it as part of their duty. How many of the remaining 33 actually did it, I do not know.

Hearings on H.R. 2498, supra note 9 at 719.

(3) Letter received by Col. John P. Oliver, JAG, Reserve, received by him while serving in Europe (as read before the House Subcommittee):

Headquarters, ... Corps
Office of the Commanding General
APO ..., U.S. Army

12 May 1945

Subject: Inadequate sentence of court

To: Lt. Col. John P. Oliver, Headquarters

1. I have read a summary of the testimony in the case of Private ..., ...th Signal Battalion and am not pleased with the

peremptory or for cause challenges. But if a military defendant were tried before an Army court, he would have had one peremptory challenge¹⁴ and if he were in the Navy, he would have had none.¹⁵ Flemings was in the Navy. In either service, an accused could submit as many for cause challenges as he chose, but he could only submit them one at a time. The determination as to whether or not cause for challenge existed was made by the other members of the panel.¹⁶ They decided such questions by a majority vote, with a tie meaning retention of the challenged member. A system whereby the challenged member's brother officers (all chosen by that same commanding officer who might at the same time be writing their efficiency reports) made the

outcome. I do not consider the court to have performed its duty.

2. The decision of the court is the decision of all its members **FOR WHICH ALL MUST BE HELD ACCOUNTABLE**. It would seem the court undertook to determine whether this man should have been tried by general court rather than a determination of his guilt or innocence from the evidence. Then, after finding him guilty of offenses warranting severe punishment, only a minor sentence was imposed. It is not my intention, when a case is referred to a general court martial that any sentence imposed be one which a special court martial might have given. I desire in the future that this be kept in mind.

.....
Major General, U.S. Army, Commanding

[Emphasis added.] *Hearings on H.R. 2498, supra* note 9 at 786.

¹⁴ *Manual for Courts Martial*, Ch. XII, §58(a), United States Army (1928).

¹⁵ Note, *The Proposed Uniform Code of Military Justice*, 62 Harv. L. Rev. 1377, 1380 (1949).

¹⁶ *Naval Courts and Boards*, Ch. IV, §391 (1937). (This was the Navy equivalent to the *Manual for Courts Martial*. The 1937 edition was in effect at the time of respondent's court-martial.)

determination as to whether or not their associate was biased, must have inspired less than confidence in an accused who felt that the panel had been loaded against him.

The challenge procedure, as well as the rest of the defense, could be conducted either by the accused himself or, if he were fortunate, by the accused's "counsel," also selected by the same commanding officer.¹⁷ Although the term "counsel" appears in this record, the person who represented Flemings in 1944 need not have ever opened a single law book. "Counsel," in 1944, was merely the Navy's term for any officer who had been assigned to assist the accused at trial. There was no requirement that this "counsel" have had any sort of legal training whatsoever.¹⁸ Indeed, there was no requirement that any member of the court have had legal training.

Although at the time it was presumably contemplated that any Navy officer would have been exposed to at least a few briefings on the Navy court-martial system, one can be skeptical as to whether in a period of "ninety day wonders," even these would actually have been given. One can also be somewhat dubious as to the extent to which commanding officers went out of their way to assign as defense counsel men who had proved themselves even the least bit competent at some other task.¹⁹ Under the Uniform Code (and the government's analysis of

¹⁷*Naval Courts and Boards*, Ch. IV, §357 (1937).

¹⁸*Naval Courts and Boards*, Ch. IV, §358 (1937).

¹⁹*Testimony of Fredrick van Pelt Bryan*, *supra* note 9 at 623: "The selection of defense counsel was often done haphazardly and I am frank to say to you gentlemen from my own experience in many cases you went over the list of officers and you suddenly found a fellow over here who was not doing much and you said,

military justice procedures is based almost entirely on the Code) the criticism has been heard that counsel is transferred to the prosecution of cases at the least sign of success or competence, but Flemings was not even accorded the protection of a right to counsel, now available to servicemen by the Code.

Even should an accused have been lucky enough to have been assigned "counsel" capable of presenting an adequate defense, his lawyer might have found his opportunities for so doing somewhat limited by the naval procedure for obtaining defense witnesses. In 1944, the pertinent provision read as follows:

The judge advocate shall summon as witnesses persons whose testimony is necessary to a trial, whether for the prosecution or the defense; but shall not, except as hereinafter provided, summon any witness at the expense of the United States.²⁰

One is apt to miss the full flavor of this arrangement unless it is realized that "judge advocate" was the naval term for prosecutor.²¹

Even should defense counsel, after patiently explaining the strategies of the anticipated defense to his opponent, have convinced him to subpoena a particular witness, there would still be the problem presented by the following provision:

The judge advocate is not authorized to subpoena as a witness, at the expense of the United States, any civilian who is not within the territorial limits in

"We can spare him and we can throw him in as defense counsel, he won't have much to do." *Compare Gideon v. Wainwright*, 372 U.S. 335 (1963).

²⁰*Naval Courts and Boards*, Ch. IV, §245 (1937).

²¹*Id.* at Ch. III, § §351, 421 (1937).

which the court can compel attendance, even though such witness be considered a material one and be willing to attend. In such cases the judge advocate shall forward the subpoena to the Secretary of the Navy. . . .²²

The procedures for obtaining defense witnesses were particularly inadequate where, as in Flemings' case, the Navy without explanation transferred the trial to a state where none of the potential witnesses lived. A naval court could not subpoena civilian witnesses from outside the state where the court was sitting.²³ Had petitioner been tried before a civil court, such court would have had access to potential defense witnesses.

Upon the completion of whatever defense an accused's command-picked, probably untrained, defense counsel could muster, the panel of officers would retire to make their decision. It should be noted, however, that this might not be the same panel which had heard the initial parts of the case. The convening authority had the power to replace sitting members, or to appoint new members, during the course of the trial.

Apparently, there have been few complaints of abuse of this particular power.²⁴ Perhaps with the opportunities to exercise influence already described, few convening authorities felt it necessary to be quite this blatant. Even as late as 1960, however, under the Uniform Code, there still existed convening authorities who felt it their prerogative to remove a whole panel, if that panel was

²²*Id.* at Ch. III, §248.

²³*Articles for the Government of the Navy*, Art. 42(b) (1939).

²⁴*Compare United States v. Whitley*, 5 U.S.C.M.A. 786, 19 C.M.R. 82 (1955).

thought to have shown undue leniency in preceding cases.²⁵

This Court in *O'Callahan* criticized the military procedure whereby only two-thirds of a hand-picked panel is necessary for conviction.²⁶ At the time Flemings was tried the situation was even worse for Navy defendants. After a trial by a command-appointed prosecutor, before a command-appointed court, where a command-appointed defense "counsel" would be required to go through the prosecution to obtain witnesses, the prosecution needed only a bare majority for conviction.²⁷

The foregoing is a bare bones outline of the naval court-martial system as it existed when petitioner was tried. No simple outline, though, can recreate the full flavor of a judicial system, however fair the formal structure, attempting to function within a closed military society, under the smothering supervision of officers holding, in wartime, literally life and death power over the fates of the various participants. In this situation, and given the often ingrained responses of career military men to the even faintly expressed desires of higher rank, justice has occasionally faltered even under the highly touted reforms of the Uniform Code. It must continually be borne in mind that Flemings was not tried under the Uniform Code, but instead under the Articles for the Government of the Navy as they existed in 1944.²⁸

²⁵*United States v. Williams*, 11 U.S.C.M.A. 459, 29 C.M.R. 275 (1960).

²⁶*O'Callahan*, *supra* at 263, 264.

²⁷*Naval Courts and Boards*, Ch. III, § 425 (1937).

²⁸Consider the following excerpt from the Report of the War Department Advisory Committee on Military Justice: "The committee is convinced that in many instances the commanding

This Court, however, does not need respondent's brief to set before it the nature of the court-martial system. That picture has already been painted—by the Court's opinion in *O'Callahan v. Parker*. The government contends that that opinion did not reflect upon the integrity of the military fact finding process. This is wishful thinking. The defects already referred to are the

officer made a deliberate attempt to influence their decisions. It is not suggested that all commanders adopted this practice but its prevalence was not denied and indeed in some instances was freely admitted. The close association between the commanding general, the staff judge advocate, and the officers of the division made it easy for members of the court to acquaint themselves with the views of the commanding officer. Ordinarily in the last war a general court was appointed by the major general of a division from the officers in his command, and in due course their judgment was reviewed by him. Not infrequently the members of the court were given to understand that in case of a conviction they should impose the maximum sentence provided in the statute so that the general who had no power to increase a sentence, might fix it to suit his own ideas. . . ." *Hearings on H.R. 2498, supra* note 9, at 647.

(2) Report of the Committee on Military Justice of the New York Lawyers Association: "The Secretary of War and the Secretary of the Navy each appointed boards of distinguished citizens to review the court-martial systems of their respective services, and to make recommendations for a thoroughgoing revision of military and naval justice. The famous Vanderbilt report, made to Secretary Patterson, and the Ballantine and Keefe reports, made to Secretary Forrestal, all found substance to the charges which had been leveled at the court-martial systems, and presented definitive recommendations for the elimination of the conditions which made such charges possible.

"The jugular vein at which all such boards aimed their recommendations was the domination and control of the court martial systems by command." *Hearings on H.R. 2498, supra* note 9, at 634.

same ones to which the Court pointed when it quoted the following language from *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955):

... [M]ilitary tribunals have not been and probably never can be constituted in such way that they can have the kind of qualifications that the Constitution *has deemed essential to fair trials of civilians* in federal courts. For instance, the Constitution does not provide life tenure for those performing judicial functions in military trials. They are appointed by military commanders and may be removed at will. Nor does the Constitution protect their salaries as it does judicial salaries. ... [F]rom the very nature of things, courts have more independence in passing on the life and liberty of people than do military tribunals. (*O'Callahan, supra* at 262, 263.) (Emphasis added.)

The command influence specter, which arose again and again in the House hearings on the Uniform Code, and which was considered a menace to military justice by the representative of the American Legion,²⁹ was precisely what the Court was referring to when it cited the following language, again from *Toth*:

A court-martial is tried, not by a jury of the defendant's peers which must decide unanimously, but by a panel of officers empowered to act by a two thirds vote. The presiding officer at a court-martial *is not a judge whose objectivity and independence are protected by the judicial tradition*, but is a military law officer. . . .

²⁹Testimony of John J. Finn, Judge Advocate, District of Columbia Dept. of the American Legion, *Hearings on H.R. 2498, supra* n. 9, at 684.

Substantially different rules of evidence and procedure apply in military trials. Apart from these differences, the suggestion of the possibility of influence on the actions of the court-martial by the officer who convenes it, selects the counsel on both sides, and who usually has direct command authority over its members is a pervasive one in military law, despite strenuous efforts to eliminate the danger. (*O'Callahan, supra* at 263, 264.) (Emphasis added.)

Presumably, when the Court used the following language, it meant that language to have some reflection upon the integrity of the military fact finding process—indeed, it is practically impossible to read the language as not so intended:

A civilian trial, in other words, is held in an atmosphere conducive to the protection of individual rights, while a military trial is marked by the age-old manifest destiny of retributive justice.... As recently stated: "None of the travesties of justice perpetrated under the UCMJ is really very surprising, for military law has always been and continues to be primarily an instrument of discipline, not justice." (*O'Callahan, supra* at 266, quoting Glasser, "Justice and Captain Levy," 12 Col. Forum 46, 49 (1969).)

To read this language, and then to determine, as did the *Gosa* court, that the words chosen by the Court in *O'Callahan* represent "no clear danger of convicting the innocent" ignores precisely the point at which the whole *O'Callahan* opinion seems to be driving:

There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution. Free countries of the

world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service. (*O'Callahan, supra* at 265, quoting from *Toth v. Quarles, supra* at 22.)

If this language, and the other excerpts from *O'Callahan* cited earlier, do not raise "serious questions about the accuracy of guilty verdicts in past trials," *Williams v. United States*, 401 U.S. at 653, it is difficult to suggest language that the Court could have used which the government would interpret as raising such questions.

The government relies upon the refusal of *DeStefano, supra*, to apply *Bloom v. Illinois, supra*, retroactively. *Bloom* held that the right to jury trial extends to trials for serious criminal contempts. Certainly *some* of the dangers which *O'Callahan* discussed with respect to courts-martial would also be present in the *Bloom* situation. Despite his status as the victim of a particular contempt, however, a civilian judge is still a judge, trained from the start of his professional career in the traditions of our legal system, including the presumption of innocence, the need for proof of guilt beyond a reasonable doubt, and, perhaps most important of all, the need for judicial decisions untainted by personal animosities or outside influence. On the other hand, "[t]he presiding officer at a court-martial is not a judge whose objectivity and independence are protected by tenure and undiminishable salary and nurtured by the judicial tradition, but is a military law officer." *O'Callahan, supra* at 264. Of course, the military law officer, found by *O'Callahan* to lack the requisite independence of a civilian judge, had not even been created at the time of *Flemings'* trial. The judicial functions were split between the "judge advocate",

whose primary function was to act as the prosecutor, and the court-martial panel itself, hand-picked by the officer who also made the initial decisions to prosecute.

There has been considerable controversy about the extent to which the faults of military justice set forth in *O'Callahan* are still dominant in courts-martial held under the Uniform Code (as were those of petitioners in *O'Callahan* and *Gosa*). Such controversies need not be resolved in this case. There has been precious little suggestion, in the congressional hearings previously cited, in court decisions, or in the academic comment upon military justice, that the biases of which Flemings complains did not infect the court-martial system in the pre-Code period when he was tried. And these biases plainly affect the "integrity of the fact finding process." Cf. *Stovall v. Denno*, 388 U.S. 293 (1967). In short respondent submits that the rule of *Williams v. United States* requires that Flemings be accorded the benefits of *O'Callahan*.³⁰

(B) Reliance

Although under the *Stovall* test, the purpose of the "new" standard is controlling, the other two factors, "the extent of the reliance by law enforcement authorities on the old standards," and the "effect on the administration of justice of a retroactive application of the new

³⁰Where the major purpose of a new constitutional doctrine is to overcome an aspect of the criminal trial which substantially impairs its truth-finding function . . . the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances. (401 U.S. at 653 (1972).)

standards" hardly suggest that prospective-only application of *O'Callahan* is in the interests of justice.

The old rule involved in *Linkletter* was that of *Wolf v. Colorado*, 338 U.S. 25 (1949), which was overruled by *Mapp v. Ohio*, *supra*. The reliance aspect discussed in *Linkletter* was heavily emphasized as being the states' reliance upon Supreme Court decisions which "again and again . . . gave . . . implicit approval to hundreds of cases in their application of its rule." (381 U.S. 637.) It would appear, therefore, that for the government to rely on this criteria it would have to point to a specific decision by the Court that has suddenly been overruled. There is no such decision.

The government argues that prospective application is also available when a decision, while not specifically overruling a prior Court decision, does make serious revisions in long-standing practices of the allegedly relying authority. But this Court pointed out in *O'Callahan* that whatever military jurisdiction has been exercised over "civilian" offenses in the Twentieth Century has itself been a departure from centuries of English and American law and custom. *O'Callahan* traced the principle back at least as far as the Seventeenth Century. There have apparently also been many instances where the findings and sentences of courts-martial have been overturned by military reviewing authorities precisely because the offense in question was exclusively one against the civil law.³¹

³¹ Duke and Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 Van. L. Rev. 435, 446 (1960), citing Winthrop, *Military Law and Precedent* 1124 (1896).

In addition to early American military precedent referred to by the Court in *O'Callahan*, there is also considerable doubt as to the extent to which the military has relied upon the claimed authority *since* World War II. National policy has long favored delivery of servicemen who committed offenses against civilians to the states. See Brief of the United States at p. 26 in *O'Callahan*, *supra*. In 1955, the Departments of Defense and Justice entered into an agreement that federal offenses which occurred on-post would be subject to Defense Department jurisdiction while off-post federal offenses would fall within the jurisdiction of the Justice Department:

The Department of Justice and Defense have found it desirable to establish ground rules for trying a serviceman charged with a civil offense in violation of both military and federal law. In general, these rules, which were established by agreement between the Departments in 1955, give to the military department concerned the responsibility of investigating and prosecuting offenses committed by persons subject to the Uniform Code of Military Justice and involving as victims only those persons or their civilian dependents residing on the military installation in question. (Duke and Vogel, *supra* n. 31, at 455, citing Army Reg. 22-160, Oct. 7, 1955, implementing *Memorandum of Understanding Between the Departments of Justice and Defense Relating to the Prosecution of Crimes Over Which the Two Departments Have Concurrent Jurisdiction* (July 19, 1955).)

From this Memorandum it would seem that, far from relying upon an allegedly broad pre-*O'Callahan* standard, the Department of Defense has for at least 18 years

employed as a matter of administrative policy the same test which *O'Callahan* later adopted.

The government also speculates that retroactivity may invalidate thousands of courts-martial conducted in reliance upon prior doctrine, but this contention is inconsistent with the government's representations to this Court in *O'Callahan*. In its brief, the government described "concurrent military jurisdiction" as "in practice, a residual jurisdiction" "Army Regulation . . . makes it army policy to deliver members to State and local civilian authorities for trial, upon request, unless the best interests of the service. . . . In fact, state and local authorities are more interested in taking jurisdiction over serious offenses and do so in the great majority of cases." Brief of the United States at pp. 26, 27.

(C) Effect on the Administration of Justice

The lack of general reliance by the military upon the supposed old standard becomes even more apparent when we examine the third *Stovall* factor, the "effect on the administration of justice of a retroactive application of the new standards." This is so because, if the "burden" is evaluated in terms of the number of retrials which will be required, or the number of situations where retrial is no longer practically possible, it would seem that the lesser the past reliance, the fewer will be the number of people who have been incarcerated under the old rule.

The figures available simply fail to bear out the government's claims as to the burdens which retroactivity will require. Taking a look at those cases tried in 1968 and 1969, prior to *O'Callahan*, the government's position would seem to suggest that a high number of these would have been reversed upon direct, post-*O'Callahan* review,

given the decision by the Court of Military Appeals to apply *O'Callahan* retroactively to cases still pending on direct review.³² The contrary is the case. Approximately one percent of all general court martial cases tried before *O'Callahan* and appealed from June 2, 1969 until December 31, 1970, contained offenses that were non-service connected.

Cases appealed to Court of Military Appeals

June 2, 1969 – December 31, 1969:	555
January 1, 1970 – December 31, 1970:	<u>983</u>
	<u>1538</u>

Cases reviewed by Army Court of Military Review

June 2, 1969 – December 31, 1969:	1025
January 1, 1970 – December 31, 1970:	<u>2420</u>
	<u>3445</u>

From June 2, 1969 to December 31, 1970, on the basis of O'Callahan

Offenses set aside by Court of Military Appeals:	30
Offenses set aside by Army Court of Military Review:	16 ³³

If these figures are representative of cases from earlier years, it would appear that the government is in error

³² *Mercer v. Dillon*, 19 U.S.C.M.A. 264, 41 C.M.R. 264 (1970); *United States v. Crapo*, 18 U.S.C.M.A. 594, 40 C.M.R. 306 (1969); *United States v. Smith*, 18 U.S.C.M.A. 609, 40 C.M.R. 321 (1969); *United States v. Prather*, 18 U.S.C.M.A. 560, 40 C.M.R. 272 (1969).

³³ Blumenfeld, *Retroactivity after O'Callahan: An Analytical and Statistical Approach*, 60 Geo. L. J. 551, 580, n. 147 (1972).

when it anticipates large numbers of petitions for retroactive relief. In fact, the Solicitor General, during the oral argument in *Relford, supra*, informed this Court that *O'Callahan* had resulted in surprisingly few petitions involving the question of retroactivity.³⁴ In a press interview, the Army Judge Advocate General has apparently conceded that few petitions for review have resulted from *O'Callahan*.³⁵ There are some 4,000 men serving military prison sentences. As these are the men with the greatest interest in asserting *O'Callahan* rights, it is extremely significant that few have apparently thought their offenses not to be service connected. Three years after *O'Callahan* it is reasonable to predict that those men with *O'Callahan* claims who were imprisoned before 1969 would have raised them. In short, the available evidence indicates that a relatively insignificant number of petitions for relief will be filed.³⁶

The reasons for the comparatively small numbers of *O'Callahan* claims are relatively easy to spot. The primary factor is probably the previously mentioned agreements between the military and civil authorities limiting the military role in prosecuting off-base offenses. As a result, taking 1968 as an example, 90% of the servicemen accused of off-post rapes were tried by federal and state courts, as were 86% of off-post larceny cases, 95% of the off-post murders, 96% of off-post house breakings. In the same year, 94% of all motor vehicle violations and 85% of all narcotics cases were handled by the local

³⁴*Id.* at 578.

³⁵*Id.* at 578, n. 142.

³⁶*Id.* at 578-80.

authorities.³⁷ Additionally, many courts-martial involve only modest penalties and minimal confinement and thus are unlikely to present opportunities for litigation.

Another major factor limiting the number of cases which would be affected by retroactivity is the large number of courts-martial which involve crimes committed outside of the United States, a category of offenses that all agree is service connected. Of all offenses tried by general court-martial in 1970, for example, an estimated 31% involved acts committed in foreign jurisdictions; two-thirds of all civilian offenses tried by special courts-martial in 1970 were heard overseas.³⁸

Finally, there is the fact that, of necessity, a huge proportion of the offenses punishable under the Uniform Code are plainly service connected—and easily determined to be such—because they (1) took place on a military base (*Relford, supra*) or (2) involved purely military offenses which would present no *O'Callahan* problems whatsoever. It has been estimated that for the years 1955 to 1964, respectively, 68% and 70% of the military caseload involved AWOL, desertion, and disobedience offenses.³⁹

The government also claims that it will be difficult to obtain witnesses because servicemen are often transferred, but in non-service connected cases witnesses are likely civilians and more easily produced in their local civilian courts.⁴⁰

³⁷ *Id.* at 580, n. 149. Blumenfeld's statistics are based on data compiled by the Record and Analysis Division of the Department of Defense.

.. ³⁸ *Id.* at 580-81, n. 149.

³⁹ *Ibid.* Blumenfeld concludes that available data indicates that few finalized convictions involved non service-connected offenses.

⁴⁰ The social costs of retroactivity are likely mitigated by the fact that the discharge statutes that would be upgraded are notoriously counter-rehabilitative because they impede future

Even for those prior cases in which *O'Callahan* issues actually are involved *and* where defendants long since released take the trouble to seek correction of their discharge status, the burden will be far less than in the usual retroactivity situation. As pointed out by both courts below, Congress has already provided a procedure by which persons such as Flemings may apply for a change in their naval records. The Board for the Correction of Naval Records was established to entertain just such requests. It is authorized to revise discharge status and to order the return of forfeited pay. That Board "may correct any military record of that department when [it] considers it necessary to correct an error or remove an injustice." 10 U.S.C. § 1552(a). Once the retroactivity of *O'Callahan* is judicially established, even cases of the sort Flemings has brought will be rendered unnecessary. The burden that he and those similarly situated will place on an administrative agency is precisely the burden which Congress has determined the agency should bear.⁴¹

Respondent believes that this Court cannot be but impressed that the Department of Defense—with all its employees, computers, and experts on military justice employment. See President's Commission on Law Enforcement and the Administration of Justice, *Task Force Report: Corrections*, Ch. VIII (1967).

⁴¹ With respect to any alleged financial burden caused by retroactivity, it should be noted that most servicemen who are tried and convicted are enlisted men with relatively short military experience and few have served enough time in the Armed Forces to have become eligible for retirement benefits. "Army statistics for 1969-70 show that less than 1.5 percent of those convicted were ages 17-19; 60 percent were ages 20-24; 7.6 percent were ages 25-29 and 0.9 percent were ages 30-35. Only 0.4 percent were over 39 years of age." Blumenfeld, *supra*, at 574, n. 128.

with access to the facts—has failed to present to the the courts below or to this Court complete statistics demonstrating that retroactivity will present burdens of the sort which would begin to outweigh the interests in accurate fact finding on which *O'Callahan* was premised. As we read the government's brief, it seems to argue that simply because many men have been court-martialed, retroactivity problems will be intractable. But gross statistics are insufficient; they must be refined to deserve consideration.

Judge Weinstein concluded that "It is not clear how many men presently incarcerated are involved, but if they have been deprived of liberty by a body lacking power to do so, they should be released. Much of the administrative burden created by applications for more favorable forms of discharge may be handled by a Congressional adoption of a short statute of limitations or by administrative remedies." (330 F. Supp. at 202.) His view was echoed by a unanimous court of appeals: "*O'Callahan*, decided more than two years ago, has yet to stir an influx of litigation which threatens to overwhelm the floodgates." (458 F.2d at 555.) Given the plain procedural deficiencies in *Flemings'* 1944 Navy court-martial, the government must point to a probability that retroactivity will impair the administration of justice. This it has failed to do.

III. RESPONDENT WAS DENIED THE RIGHT TO TRIAL IN THE VICINAGE.

An additional consideration supports affirmance of the judgment of the court below.⁴² Flemings contended in the courts below that he was denied the right guaranteed by Article III, Section 2, Clause 3 of the Constitution⁴³ to trial in the vicinage. As the question of the application of this provision to the military is of first impression, no issue of retroactivity arises with respect to it. O'Callahan committed his crime and had its trial in the territory of Hawaii. The question, therefore, of denial of the right to trial in the vicinage under the military system was not mentioned. Flemings, on the other hand, was transported to a state which had no connection with the offense for trial.

In Anglo-American law, the right to trial in the vicinage has been considered fundamental. As early as the Magna Carta, the King guaranteed to his subjects the right to trial in the vicinage:

Assizes of novel disseisin, and of most d'ancestor, and of darrien presentment, shall not be taken but in their proper counties. (*Magna Carta*, ¶ 17, 18.)

One of the grievances mentioned in the Declaration of Independence was that the English were "transporting us

⁴² A prevailing party "may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the [lower] . . . court," *Dandridge v. Williams*, 397 U.S. 471, 475 n. 6 (1970).

⁴³ The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

across the seas to be tried for pretended offenses. . . .” The right to trial in the state or district in which the crime was committed was included in every version of the Constitution. Congress apparently believed the right to be so fundamental that it was reiterated in the Sixth Amendment. When first proposed, the Amendment included only the right to trial by jury, but during the congressional debates Representative Livermore suggested the advisability of including the right to trial in the vicinage in the Sixth Amendment also. The change was adopted by voice vote without anyone speaking in disagreement. (1 Annals of Congress 785 (1789).)

The right is such an accepted part of our traditions that there is a paucity of cases discussing it, but had Flemings been tried in either New Jersey (where the automobile was stolen) or Pennsylvania (where it was transported), he would have had the right to a trial in the vicinage.⁴⁴ The Advisory Committee on the Rules of Criminal Procedure for the Courts of the United States defended the Rule 21 restriction of applications for change of venue to the defendant on the ground that “the defendant has a constitutional right to a trial in the district where the crime was committed.” (Rule 21, n. 3, 18 U.S.C. (Appendix), at 4498.)

The military has recognized the importance of trial in the vicinage. In *Wade v. Hunter*, 336 U.S. 684 (1948), the Army transferred the defendant’s case to a different command because of the fact that the command which had originally held him for trial had, because of the quick

⁴⁴ *State v. Wyckoff*, 31 N.J.L. 65, 68-69 (Sup. Ct. 1864); *State v. Brown*, 1 N.J. Misc. 377, 378 (Sup. Ct. 1923); *Commonwealth v. Wojdakowski*, 161 Pa. Super. 250, 53 A.2d 851, 855 (Super. Ct. 1947).

advance of the battle lines, moved many miles from the site of the crime. The trial was transferred back to a court closer to that site. In that case, the government defended its actions as part of

the policy of the American Army in Europe to accelerate prompt trials in the immediate vicinity of the alleged offense. (*Id.* at 687.)

If the fighting army in Europe could honor the right to trial in the vicinage in the middle of a war zone, there is little question that the Navy could have given Flemings a trial in Pennsylvania or New Jersey.

Justice Frankfurter, writing for the Court in *United States v. Johnson*, 323 U.S. 273, 275 (1944), suggested that prejudice is inherent in any trial outside the vicinage of the crime:

Aware of the unfairness and hardships to which a trial in an environment alien to the accused exposes him, the Framers wrote . . . Article III, § 2, cl. 3. . . .

But the Court need not adopt a *per se* rule, requiring trial in the vicinage in every case. Judge Weinstein found that Flemings suffered prejudice to his right to mount an effective defense when the navy moved the trial to New York State.⁴⁵

⁴⁵ The case before us demonstrates the worth of this right. Here the court-martial proceeding was held in the Brooklyn Navy Yard and plaintiff was incarcerated prior to trial on an island in Long Island Sound. How could he be expected to mount an adequate defense so many miles from the actual locus of the alleged crime in central New Jersey or Pennsylvania? Certainly distance complicated what was, in any event, a difficult task. This factor is especially important since the Pennsylvania State Troopers may have had exculpatory information. (330 F. Supp. at 203.)

The automobile involved in this case had been stolen while it was parked on a street in Trenton, New Jersey. Flemings claims that he had been hitchhiking in Pennsylvania—in civilian clothes—when he was picked up by another sailor in the automobile; that he was merely a passenger; and that he was not aware that the vehicle was stolen. While the driver was absent visiting a friend and Flemings was waiting in the car, state troopers stopped to investigate. Flemings alleged that as they talked with him the troopers saw the other sailor running away and that a gas station attendant who the troopers interviewed shortly after the arrest corroborated that he was hitchhiking. Plainly then a trial far from the vicinity of the alleged criminal acts impaired his chances of producing evidence. There can be little doubt about this conclusion when it is recalled that a naval court could not, in 1944, subpoena civilian witnesses from outside the state where the court was sitting. See n. 22, *supra*.

In addressing the question of denial of the right to trial in the vicinage in the courts below, the government conceded both the existence of a constitutional right to trial in the vicinage and that Flemings was not tried in the vicinage. The government contended, however, that the right is a requisite only of criminal trials in the civil courts. But servicemen are protected "from trials conducted in violation of express constitutional mandates," *United States v. Augenblick*, 393 U.S. 348, 356 (1969). See also *Burns v. Wilson*, 346 U.S. 137 (1953). Consistent with the Constitution, the armed services may not transfer a man hundreds of miles from the place where an alleged offense took place while at the same time depriving him of effective means to subpoena witnesses in his defense.

IV. RESPONDENT'S OFFENSE OF AUTO THEFT WAS NOT SERVICE CONNECTED.

The constitutional test of military jurisdiction, as set forth in *O'Callahan, supra*, and as refined in *Relford v. Commandant*, 401 U.S. 355 (1971), strongly suggests that a court-martial does not properly adjudicate charges that a serviceman stole a non-military automobile from the center of a large American city. When one applies the service connection test in light of the *O'Callahan* warning that the Constitution permits courts-martial to exercise jurisdiction only where "special needs" of the military justify that jurisdiction (395 U.S. at 369), it becomes clear that Flemings' alleged offense was not service connected.

As was the case in *O'Callahan*, Flemings' crime was not even remotely connected with his military duties. As was the case in *O'Callahan*, the crime alleged was not committed on or even adjacent to a military camp or enclave. In both that case and this, the civil courts were open and available. In both, the offense was committed, not at a far-flung outpost, not in the occupied zone of a foreign country, but within the territorial limits of the United States. If anything, the argument for civilian handling is even stronger here, where the offense was committed not in a territory but in a state.

In neither case were the "special needs" of the military involved in any way: "The offenses did not involve any question of the flouting of military authority, the security of a military post, or the integrity of military property." (395 U.S. at 274.) In *O'Callahan*, the Court stressed that the victim was not "performing any duties relating to the military." (395 U.S. at 273). Neither was the stolen automobile in this case used in the performance of any military duty.

Finally, as in *O'Callahan*, "we deal with peacetime offenses, not with authority stemming from the war power." (Emphasis added.) (395 U.S. at 273.) Auto theft has no inherent relationship to wartime military needs and nothing in the facts of the offense suggest that the Navy had a wartime interest in prosecuting it.

This leaves the sole distinction of *O'Callahan* the fact that petitioner was AWOL at the time of the offense. The court below held that this element is simply not enough to establish a "special need" of the military, given the *O'Callahan* principle that court-martial jurisdiction be limited to the least possible power adequate to meet its special purposes. In a case with "strikingly similar" (458 F.2d at 548, n. 11) facts to this, the Court of Military Appeals has held that the fact of improper absence does not confer military jurisdiction. *United States v. Armes*, 19 U.S.C.M.A. 15, 41 C.M.R. 15 (1969). Indeed, that court found a lack of court-martial jurisdiction even where, in *Armes*, the offense was committed "to facilitate an escape from military confinement."

Two years after *O'Callahan*, the Court further considered the scope of "service connection" in *Relford*, *supra*, and set forth a list of twelve factors to be used as a guide in determining whether a particular crime was service connected.⁴⁶ The Courts below found that ten of

⁴⁶ (1) The serviceman's proper absence from the base. (2) The crime's commission away from the base. (3) Its commission at a place not under military control. (4) Its commission within our territorial limits and not in an occupied zone of a foreign country. (5) Its commission in peacetime and its being unrelated to authority stemming from the war power. (6) The absence of any connection between the defendant's military duties and the crime. (7) The victim's not being engaged in the performance of any duty relating to the military. (8) The presence and availability of a civilian court in which the case can be prosecuted. (9) The absence

these twelve factors (2, 3, 4, 6, 7, 8, 9, 10, 11 and 12) clearly point away from court-martial jurisdiction in the instant case and the government has not disputed this finding. Apparently, the government contends that the remaining two factors (1 and 5) are in and of themselves sufficient to establish court-martial jurisdiction.⁴⁷

of any flouting of military authority. (10) The absence of any threat to a military post. (11) The absence of any violation of military property. (12) The offense's being among those traditionally prosecuted in civilian courts. (401 U.S. at 365.)

⁴⁷ The second numbered factor, commission of the crime away from base, was clearly a major determinant of the outcomes in both *O'Callahan* and *Relford*. *Relford* especially emphasized the obvious military interest in preserving order on a military reservation and in insuring the safety of persons and property on such a reservation. There is no contention here that Flemings' acts even remotely affected the security of any military reservation.

There is likewise no suggestion that the crime was committed at a place under military control. (Factor three.)

The auto theft was committed in the State of New Jersey and was clearly within the competence of the New Jersey courts. Factor four thus points away from military jurisdiction.

There has been no suggested connection between the automobile theft and appellee's military duties. As he was AWOL at the time of the theft, there is very little likelihood that any such connection could exist. The sixth factor thus also points away from military jurisdiction.

There has been no suggestion that the owner of the automobile was at the time engaged in the performance of any duty relating to the military (factor seven). He has in fact stated that he was not so engaged. Furthermore, at the time of the court-martial the navy believed that the automobile was owned by a civilian, for Flemings was charged with theft from a civilian. (Factor seven.)

Respondent agrees with the government that the issue of service connection is not determinable by a mechanistic process of "factor counting." There may be situations where one of the twelve *Relford* factors alone will serve to establish service connection (e.g., an off-post assault on a superior officer). But respondent submits that the only two factors applicable here, numbers one and five, simply do not establish any "special needs" of the military strong enough to overcome the heavily emphasized preference of *O'Callahan* for trial by civilian courts.

It should be noted that factor number one, authorized absence from base, if not present, in and of itself establishes a separate military crime—Absence Without Leave. This crime is clearly service-connected, and, when

There has been no suggestion, nor could there be, that the civil courts of New Jersey or Pennsylvania were not open and available to hear the case (factor eight). The presence of a wartime situation, without more, does not operate to restrict the normal jurisdiction of the civil courts. *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

Factor nine does not suggest military jurisdiction, as the theft of a private auto from an off-post area in no way operates to "flout" military authority.

The absence here of a threat to any military base (factor ten) also strongly points toward civil court jurisdiction.

Military property was not involved (factor eleven).

Unlike some offenses, such as disobedience to an officer, auto theft is traditionally and frequently dealt with by the civil courts, which courts have considerably more expertise in trying this sort of case than have courts-martial. Furthermore, civil courts have never shown any reluctance to handle auto theft cases. Factor twelve is thus the final of the ten factors pointing away from court martial jurisdiction.

combined with the President's power to regulate the length of permissible court-martial sentences, 10 U.S.C. § 856, clearly gives the military ample means to protect its undeniable interest in having troops present for duty when necessary, *cf. United States v. Armes, surpa*. The further use of improper absence to establish a military connection for otherwise "civilian" crimes would not give additional protection to the military's proper concerns, which are already fully protected by the undisputed power to punish for AWOL.⁴⁸

As a district court has stated:

... [T]he fact of leave is not a controlling element in *O'Callahan*... The question of leave only emphasizes the fact that the crime was not committed within a military reservation, and that it probably involved a non-military victim. Leave merely gives the potential criminal the opportunity to enter the civilian community. Leave itself does not change the quality of the criminal act nor does its presence or absence change the fact that the crime itself is committed within a civilian community, involved if any a civilian victim and could be completely handled within the community

⁴⁸ The government suggests that Flemings may have stolen a vehicle to facilitate his absence without leave, and that this circumstance converts the car theft into a service connected offense. But the record is barren of evidence supporting the government's claim. Flemings was arrested approximately two weeks after he failed to return to his base. It builds speculation on speculation to assert that he would have returned to his base had he not stolen a car. The "evidence does not indicate that Flemings was in any way indispensable to his unit, and the government's conduct in transferring him to Harts Island makes clear that his contribution to the war effort was not required." (458 F.2d at 548, n. 12.)

by an application of its own criminal processes. *Moylan v. Laird*, 305 F. Supp. 551, 557 (D. R.I. 1969).

See also *United States v. Crapo*, *supra* (AWOL and robbery and attempted robbery); *United States v. Castro*, 18 U.S.C.M.A. 598, 40 C.M.R. 310 (1969) (AWOL and carrying of a concealed weapon); *United States v. Chandler*, 18 U.S.C.M.A. 593, 40 C.M.R. 305 (1969) (burglary and larceny while AWOL); *United States v. Armstrong*, 19 U.S.C.M.A. 5, 41 C.M.R. 5 (1969) (AWOL and murder).

The factor remaining, number five, is the fact that the theft was committed during wartime. Flemings concedes that where a crime has any impact upon the military, the magnitude of that impact may be increased if the military organization is at war. A crime which, for example, threatened the security of a military base, or the safety of military personnel or property might, if committed in wartime, have an enhanced impact upon the ability of the military to perform its mission. This is not the case, however, with an off-base theft of an auto on American soil. Whether committed in wartime, in peacetime, or in the state of *de facto* war which presently exists, military interests are simply not affected in any discernible manner unless special circumstances—not here alleged—connect the offense to the war effort.

If the government pointed to any significant connection between Flemings, his alleged theft, and the war effort, a different case would be presented. But *O'Callahan* and *Relford* require careful analysis of the relationship of an offense to authority stemming from the war power. On this record, no such relationship appears. The government's overbroad attempt to equate

wartime with service connection would mean, if accepted, that *O'Callahan* had absolutely no application so long as the United States was at war. Such a result is at odds with a long line of cases favoring civilian court jurisdiction when those courts are open and in the undisturbed exercise of their jurisdiction, e.g., *Caldwell v. Parker*, 252 U.S. 376 (1920); *Coleman v. Tennessee*, 97 U.S. 509, 515 (1878).⁴⁹

The time-honored test for military jurisdiction was set out well before World War II by one of the country's foremost experts on military law: The crime "... must have been committed under such circumstances as to have directly offended against the government and discipline of the military state." Winthrop, *Military Law and Precedents* 723-24, 2d ed. (1920 reprint). Flemings' crime of AWOL met this test. His alleged auto theft, however, did not, and the court-martial was without jurisdiction to try him for it. His conviction for that crime is, therefore, a nullity.

⁴⁹ A final factor relied upon by the government in the courts below, the status of the "victim" as a serviceman, here has no military significance. In some situation, the status of the victim would establish a service connection. This would be true where, for example, the crime arose out of a grudge relating back to either party's military status or duties. In the instant situation, though, as found by the court below, "The fact that the owner of the car was a member of the Armed Forces was a 'happenstance' with 'no military significance,'" *Flemings*, 458 F.2d at 548, citing *Armes*, *supra*. The theft would have had no impact whatsoever upon the military had it been committed by a civilian, or had it involved a vehicle owned by a civilian (as the Navy believed in 1944). There is no special military disciplinary interest created by the chance status of the owner as a serviceman—especially when the Navy in 1944 charged Flemings with theft of a vehicle owned by a civilian.

CONCLUSION

WHEREFORE, respondent prays that the judgment of the courts below be affirmed.

Respectfully submitted,

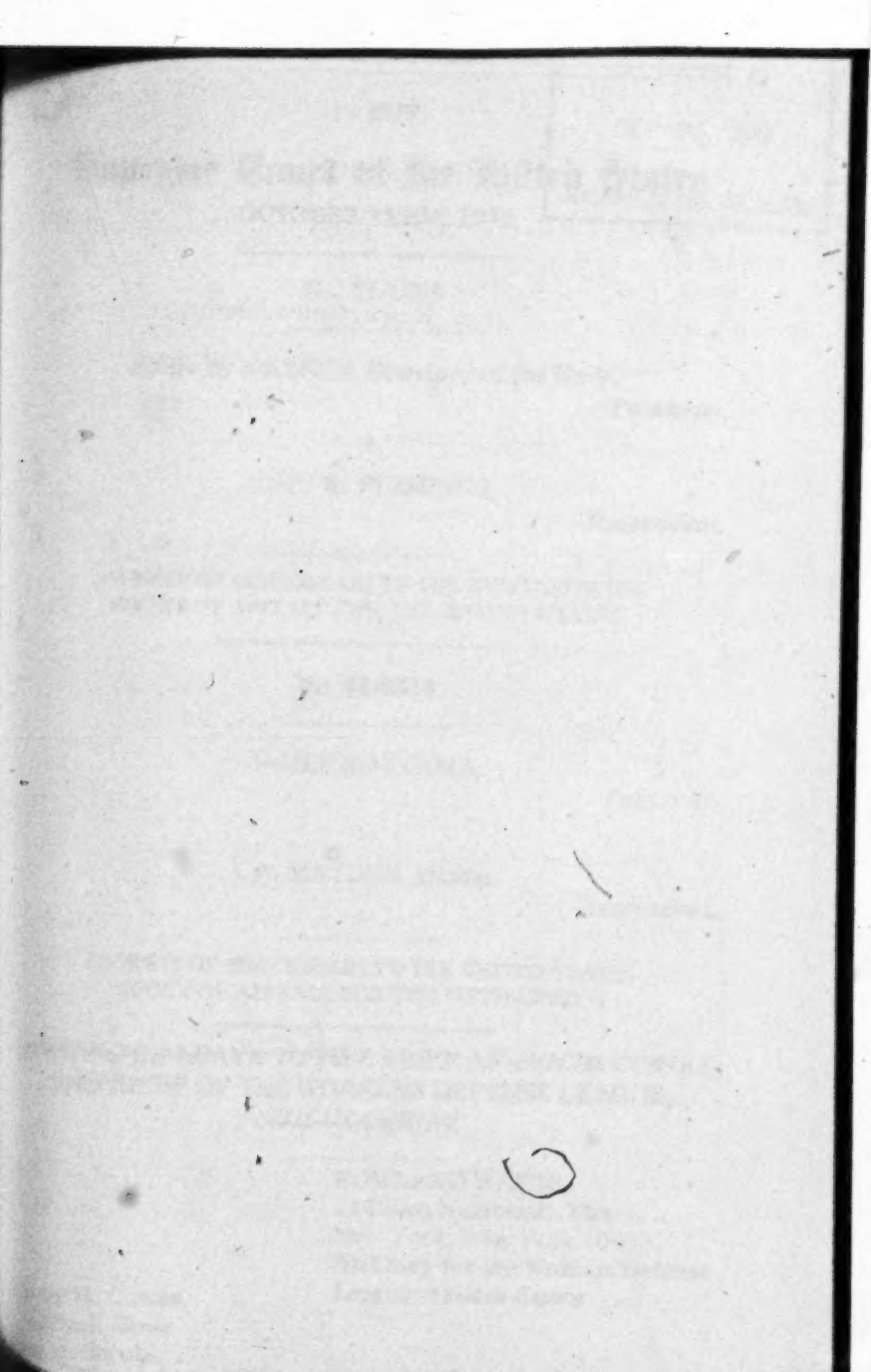
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IN THE

OCT 25 1972

Supreme Court of the United States

MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1972

No. 71-1398

JOHN W. WARNER, Secretary of the Navy,

Petitioner,

v.

JOHN W. FLEMINGS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 71-6314

JAMES ROY GOSA,

Petitioner,

v.

J. A. MAYDEN, Warden

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

~~MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE~~
~~AND BRIEF OF THE WORKERS DEFENSE LEAGUE,~~
~~AMICUS CURIAE~~

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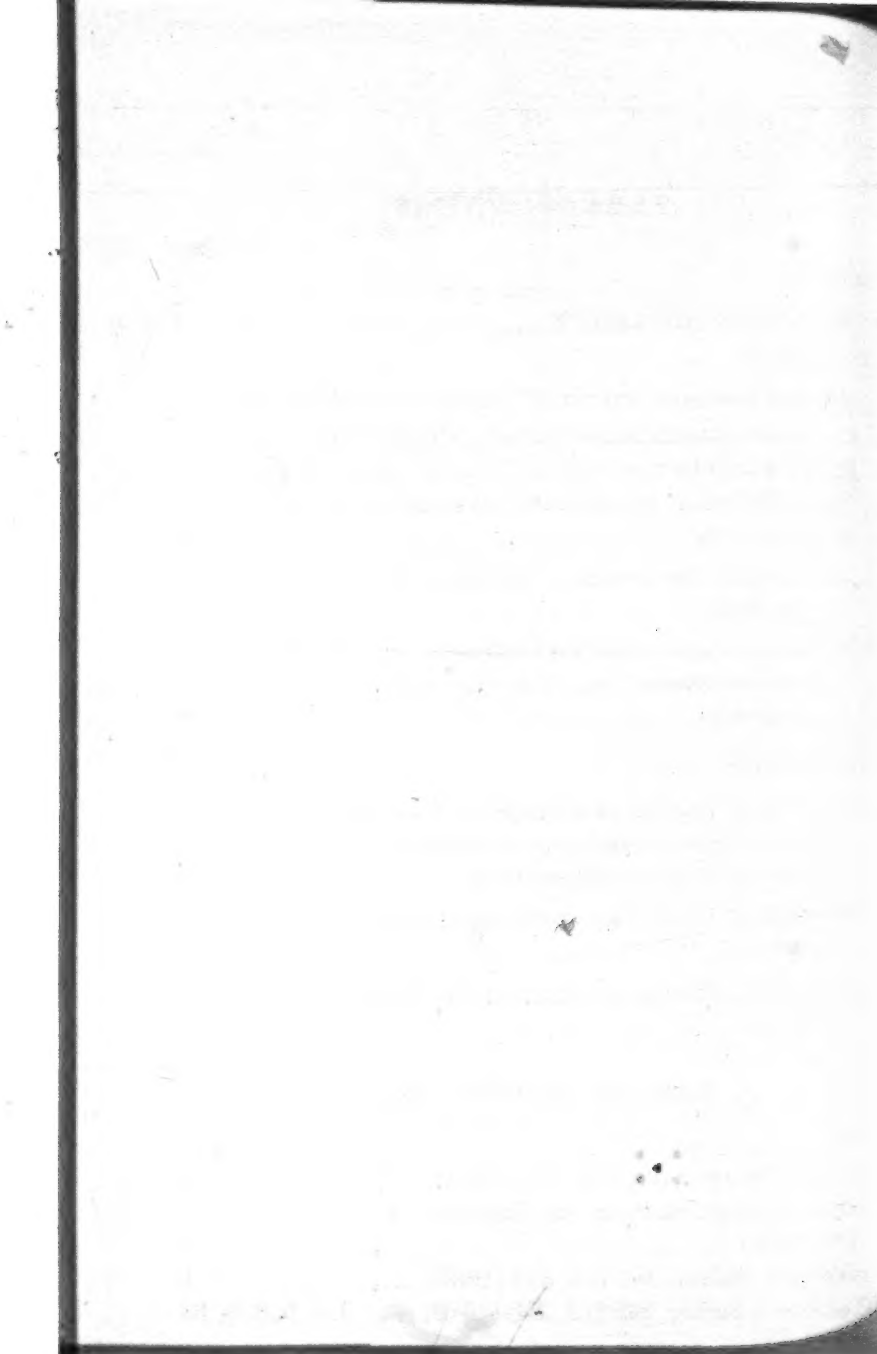
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Motion for Leave to File Brief as *Amicus Curiae*

**TO THE HONORABLE THE SUPREME COURT OF THE
UNITED STATES:**

The undersigned, as counsel for the Workers Defense League, located in New York City, respectfully moves this Honorable Court for leave to file the accompanying brief as *Amicus Curiae*. The written consent of the attorneys for all parties has been obtained and filed with the Clerk of the Court. Although the brief was not served within the period prescribed by the Rules of this Court, counsel for all parties were advised, when their consent was requested, that the text of the accompanying brief would be forwarded to them on October 13, 1972, and that service of the printed brief would be accomplished not later than October 23, 1972. Said dates have been complied with.

Respectfully submitted,

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October 20, 1972

IN THE
Supreme Court of the United States
OCTOBER TERM, 1972

No. 71-1398

JOHN W. WARNER, Secretary of the Navy,
Petitioner,

v.

JOHN W. FLEMINGS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

**BRIEF OF THE WORKERS DEFENSE LEAGUE,
AMICUS CURIAE**

INTEREST OF THE AMICUS CURIAE

The Workers Defense League is submitting a brief herein as
amicus curiae because of its interest in the question of jurisdic-

tion and the impact of court-martial proceedings in these cases.

The Workers Defense League is an organization dedicated to the protection and extension of those civil rights which are guaranteed by the laws and Constitution of the United States. It has long been concerned with military justice, and previously appeared as *amicus curiae* in *Harmon v. Brucker*, 355 U.S. 579 (1953).

The Workers Defense League maintains that courts-martial, despite recent improvements, have always been fundamentally and procedurally infected with infirmities which mandate this Court's rejection of their past assertions of jurisdiction over offenses respecting which the Federal and State civil courts had statutory jurisdiction.

ARGUMENT

IF RETROACTIVE APPLICATION OF O'CALLAHAN IS NOT MANDATED BY CLASSICAL JURISDICTIONAL CONCEPTS, ADMINISTRATIVE IMPACT WOULD BE SO MINOR, AND PERSONAL IMPACT ON THE FORMER DEFENDANT SO SUBSTANTIAL, AS TO MERIT GRANTING OF RETROACTIVITY.

The cases at bar are concerned with the possible retroactive application of this Court's holding in *O'Callahan v. Parker*, 395 U.S. 258 (1969), as refined in *Relford v. Commandant*, 401 U.S. 355 (1971). In effect, this Court will determine whether, if retroactivity is not mandatory, it is appropriate in light of the considerations set forth in *Linkletter v. Walker*, 381 U.S. 618 (1965), and *Stovall v. Denno*, 388 U.S. 293 (1967).

It is our contention that retroactivity is required because *O'Callahan* is concerned with what Judge Weinstein aptly termed "classic competence jurisdiction," *United States ex rel.*

Flemings v. Chaffee, 330 F.Supp. 193, 196 (E.D. N.Y. 1971). It is horn book law that the rulings of a court lacking power over the person or the act involved are necessarily null and void. To hold otherwise "would militate against our whole concept of power and jurisdiction," *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 248 (1960).

If, nonetheless, the *Linkletter-Stovall* considerations are here pertinent, we contend that the onerous effects of punitive discharges awarded by courts-martial are so substantial, and the burden upon the Government of administering appropriate relief to affected applicants so readily met, as to compel this Court to hold that court-martial jurisdiction should always have been limited to the least possible power adequate to protect valid military interests, *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 23 (1955). Every unnecessary extension of military jurisdiction has constituted an improper encroachment upon the civil courts and the treasured personal rights secured by the Bill of Rights, *Reid v. Covert*, 354 U.S. 1, 21 (1957).

We therefore offer to this point the following data and arguments.

A. ADMINISTRATIVE IMPACT OF RETROACTIVITY WOULD BE MINOR

During the three year interval since the *O'Callahan* decision, the only published statistical analysis of its probable retroactive impact has been Blumenfeld, *Retroactivity after O'Callahan: an Analytical and Statistical Approach*, 60 Geo. L. J. 551 (1972) (hereafter, *Blumenfeld*). We have made a case-by-case analysis of all pre-*O'Callahan* opinions reported in Volumes 3, 8, 13 and 18 of Decisions of the United States Court of Military Appeals, so as to augment the data presented in *Blumenfeld*. Of the 590 cases analyzed, 10 (1.7%) would probably be affected by retro-

activity; 139 (23.6%) of the opinions do not contain sufficient factual information for determining the effect with reasonable certainty; the remaining 441 (74.7%) almost certainly will not be affected by the outcome of the cases at bar. Appendix A gives the enumerations by categories.

The figures for affected cases should be read with some caution. Approximately one-third of all courts-martial involve unauthorized absences (denounced by Article 86, Uniform Code of Military Justice, 10 U.S.C. §886); Appendix B; cf. *Blumenfeld*, 580-581, n. 149. It has been the experience of the Military Justice Program of *amicus* that such cases present few evidentiary or procedural problems likely to be granted review by the Court of Military Appeals. Consequently, civilian-type offenses are reviewed in that Court with greater proportional frequency than are they tried by courts-martial. As there is no reason to believe that, prior to the *O'Callahan* decision, *O'Callahan-Relford* considerations were weighed in deciding whether to grant review in the Court of Military Appeals, any over-representation of civilian-type offenses in the sample of cases analyzed would *a fortiori* extend to cases which would be affected by retroactive application of *O'Callahan*.

The above data lend weight to Blumenfeld's determination that "approximately one percent of all general court-martial cases tried and appealed from June 2, 1969, until December 31, 1970, involved offenses that were nonservice-connected," *Blumenfeld*, 580, n. 147. The data suggest that said determination can be generalized to all such courts-martial during the past two decades.

Even if it is assumed that substantial numbers of affected individuals would seek administrative or judicial relief,* the

* A questionable assumption in the light of recent experience. See *Blumenfeld*, 578 *et. seq.*, n. 140-149. As a practical matter, only sentences to lengthy periods of confinement or punitive discharge create a sufficient-

attendant administrative burden is insufficient cause for rejecting retroactivity. "The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government," *Reid v. Covert, supra*, at 14. If we are indeed a nation ruled by laws, not men, judicially rewriting the Constitution to suit alleged administrative convenience would constitute a blatant succoring of bureaucratic arrogance.

B. CONSEQUENCES OF PUNITIVE DISCHARGES ARE DISPROPORTIONATELY SEVERE WHEN CONTRASTED WITH CIVILIAN SENTENCES

A Bad Conduct or Dishonorable Discharge can be given only upon conviction by general or certain special courts-martial. In the Army, approximately 81% of all enlisted men convicted by general courts-martial during calendar years 1964-1968 were adjudged punitive discharges. Appendix B, Table B-3. After serving any sentence of confinement, the recipient of such a discharge is subject to consequences which far exceed any disability that can grow out of a civilian criminal conviction.

ly great burden on the affected individual as to cause efforts to obtain relief years later. Virtually no summary court-martial convictions are likely to be attacked. Few if any special court-martial convictions not resulting in a Bad Conduct Discharge would be challenged.

It should be noted that our statistics are not necessarily representative of convictions prior to 1951. Those convictions antedate Congressional and Presidential actions designed to secure a fair trial for an accused serviceman. In such cases, the very fact-finding procedure upon which the conviction is predicated is necessarily suspect. Thus there is substantial doubt that Flemings in fact stole the car (in 1944); there is no serious doubt that Goss committed the rape (in 1966).

The recipient of a punitive discharge is deprived of virtually all veterans' benefits, including medical benefits for disabilities incurred in the line of duty prior to commission of the underlying offense. (By way of contrast, a civilian employee later fired for cause does not lose disability compensation.) He is subject to the same statutory disabilities as is a civilian ex-convict. Further, he is stigmatized as disloyal at every turn in his civilian life.

Employment opportunities are all but non-existent in any branch of Government or in defense-related industry. In the balance of the private sector, employment applications universally require statements of criminal convictions and military service, including type of discharge. The punitively discharged applicant consequently starts with two red flags when seeking employment.

R-T-P, Inc. (formerly the Joint Apprenticeship Program, founded by *amicus*) advises us that approximately half of the trade unions will not entertain an apprenticeship application from recipients of punitive discharges. Those that do, do so hesitantly. The financial sector perceives a greater risk in lending money to punitively discharged persons. In Appendix C, a single but not atypical case history is described.

Regardless of the age of the accused at time of trial, there exists no effective statutory provision for expunging or remitting a punitive discharge at any time.* This contrasts with the

* Major General Kenneth J. Hodson, Chief Judge of the United States Army Court of Military Review, and formerly The Judge Advocate General of the Army, anticipates the adoption of such a provision:

[The trial judge at courts-martial] should have the power to suspend and the power to impose deferred sentences. A deferred sentence is a sentence which is withheld for a prescribed period. If the accused straightens out, we'll say, in six months, then the judge issues an order which wipes out not only the sentence but the conviction. It

salubrious provisions of 18 U.S.C. §§4209, 5005 *et. seq.* (Federal Youth Corrections Act), 5031 *et. seq.*, and comparable legislation enacted by the various States.

The contrast is particularly striking when viewed in the light of the youthfulness of personnel tried by general courts-martial. Appendix B, Table B-1 contains data provided by the Records Control and Analysis Branch of the United States Army Judiciary for calendar years 1960 through 1969. They reveal that of 18,589 enlisted personnel tried by general courts-martial, 6,365 (34%) were below the age of twenty; 8,614 (47%) were between twenty and 24 years of age, inclusive.

During Fiscal Years 1971 and 1972, more than 90% of the records of trial received for review at the Army's Defense Appellate Division involved convictions of persons under twenty-five years old at time of trial. Appendix B, Table B-4.

Data provided by the Military Justice Division of the Office of the Judge Advocate General of the Navy, contained in Appendix B, Table B-2, are comparable. We have been advised that the Air Force does not keep comparable statistics.

We contend that the penalties involved in most of those convictions which might be voided by retroactive application of *O'Callahan* are far in excess of the maximum permitted in the civilian courts which properly had concurrent if not exclusive jurisdiction over the offenses charged. Furthermore, the possibility that subsequent good behavior would result in expunging

purges the man's record completely. In other words, the ABA Standards on Sentencing Alternatives should be adopted . . .

Hodson, *The Manual for Courts-Martial—1984*, 57 Mil. L. Rev. 1, 11 (1972). Note that the Department of Defense has recently adopted a policy and implemented procedures favoring recharacterization of undesirable discharges (typically awarded on request, in lieu of court-martial) in cases involving use or possession of drugs. *Blumenfeld*, 572, n. 117.

the record of conviction does not exist; although in many cases it would, if the accused had been tried in civil courts.

Because the effect of retroactivity on the administration of justice, if relevant to the instant cases, must be examined from the perspectives of the affected persons as well as the administrators of justice, we submit that the data we have presented tips the balance of interests in favor of retroactive application of *O'Callahan*.

CONCLUSION

It is respectfully submitted that the judgment of the United States Court of Appeals for the Second Circuit should be affirmed, and the judgment of the United States Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

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APPENDIX A**ANALYSIS OF A SAMPLE OF REPORTED DECISIONS
OF THE UNITED STATES COURT OF MILITARY APPEALS
FOR POSSIBLE EFFECT OF RETROACTIVITY**

The opinion in every case reported in 3 USCMA (October Terms, 1952-3), 8 USCMA (October Terms, 1956-7), 13 USCMA (October Terms, 1961-2) and 18 USCMA (October Term, 1968) but excluding those cases decided subsequent to June 2, 1969, has been analyzed in an effort to determine if retroactive application of *O'Callahan* would nullify the proceedings.

In conducting the analysis, consideration was given to the following factors: (A) Was the nature of the offense(s) charged purely military (e.g., desertion, disobedience)? (B) Did the perpetrator use his or his victim's military status as an aid to accomplishing the crime (e.g., assaulting one's company commander while off post would be deemed service-connected)? (C) Was the offense committed on post or at post limits? (D) Did the crime occur in a locality where a non-military American flag court was open (N.b., Okinawa was deemed not be such a locality on the authority of *United States ex rel. Jacobs v. Froehlke*, 334 F.Supp. 1107 (D. D.C. 1971), appeal pending)?

The results are summarized in Table A below. A list of those cases which apparently would be affected by retroactivity, and those in which the opinion is insufficiently detailed to permit such a determination, is provided so as to permit replication.

As not all courts-martial are reviewed by the Court of Military Appeals, and as cases in which the Court reversed a conviction are included in the tabulation, extrapolations from these data must be made with caution.

**TABLE A: EFFECT OF RETROACTIVITY
ON CASES IN SAMPLE**

Vol.	Affected	Indeterminate	Unaffected	Total
3	3	16	128	147
8	4	56	162	222
13	3	30	88	121
18	0	37	63	100
total	10	139	441	590
%	1.7	23.6	74.7	100.

3 USCMA: **8 USCMA:** **13 USCMA:** **18 USCMA:**

Cases which would be affected, listed by docket number in sequence of Court's decision:

1244	9392	15700	[none]
1990	9592	16268	
2720	9444	16405	
	9768		

Indeterminate cases:

1194	9223	9646	10180	15282	16163	21346	21689
1945	9401	9738	9546	15332	16204	20903	21703
2119	9113	9861	10227	15334	16018	21342	21526
2068	9587	9762	9645	15525	16207	21004	21555
3354	9731	10331	10311	15636	16282	21203	21657
3580	9992	10428	10833	15724	16489	21223	21676
3627	9199	10597	10567	15094	15936	21100	21704
3629	9681	9647	10799	15676	16064	21465	21709
1738	9421	9737	9723	15643	16172	21106	21719
3102	9687	10009	10418	15626	16237	21306	21721
2819	9606	10088	10429	15636	16491	21253	21636
1434	9807	10198	10698	15718		21284	21628
2735	9590	9849	10888	15888		21409	21430
3449	9771	9836	11019	15615		21630	21650
2808	9774	9986	10994	15883		21742	21717
3630	9668	10109	11050	15909		21615	21913
	9783	10710	10072	15900		21633	21953
	10417	9715	10861	15741		21653	21956
	10479	10018		15999		21680	

APPENDIX B

ARMY, NAVY AND MARINE CORPS
COURT-MARTIAL STATISTICSTABLE B-1: ARMY ENLISTED PERSONNEL TRIED
BY GENERAL COURTS-MARTIAL

	Calendar Year											Total	%
	1960	1961	1962	1963	1964	1965	1966	1967	1968	1969			
AGE:													
Under 20	656	581	656	698	569	468	549	763	735	690	6365	34.	
20-24	663	646	734	854	812	639	758	1168	1362	978	8614	47.	
25 and over ..	601	566	430	382	353	287	269	261	254	207	3610	19.	
Total ^a	1920	1793	1820	1934	1734	1394	1576	2192	2351	1875	18589	100.	

GENERAL COURT-MARTIAL OR ADJUDGED BAD CONDUCT DISCHARGE
BY SPECIAL COURT MARTIAL

Calendar Year

	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	Total
AGE 17-19:												
General Court	160	185	142	90	73	121	182	188	205	222	145	1713
BCD Special Court	1467	1337	1165	847	850	1236	1238	787	838	854	820	11439
Total	1627	1522	1307	937	923	1357	1420	975	1043	1076	965	13152
AGE 20-24:												
General Court	212	213	292	248	175	262	401	596	627	854	603	4483
BCD Special Court	1222	1159	1366	1270	1051	1373	1752	1766	1820	1814	1519	16112
Total	1434	1372	1658	1518	1226	1635	2153	2362	2447	2668	2122	20595
AGE 25-30*:												
General Court	58	55	65	58	42	50	51	72	69	98	68	686
BCD Special Court	220	159	159	136	116	134	140	147	146	132	113	1602
Total	278	214	224	194	158	184	191	219	215	230	181	2288

* For 1970 and 1971, excludes persons 30 years old.

N.b., data as to trials of Navy and Marine Corps personnel above age 30, and respecting total number of trials, is not available. Consequently, precise percentages cannot be calculated. But the available data reflect a pattern almost identical to that found in the Army data, Table B-1, and suggest that trials of persons over 30 years old, for each category, involve less than 10% of the total number of trials.

**TABLE B-3: ENLISTED PERSONNEL CONVICTED BY
ARMY GENERAL COURTS-MARTIAL, 1964-1968**

	Calendar Year					Total
	1964	1965	1966	1967	1968	
Number Convicted .	1650	1318	1483	2086	2239	8776
Discharges Adjudged:						
Dishonorable	634	517	694	902	880	3627
Bad Conduct	729	533	496	808	915	3481
Total	<u>1363</u>	<u>1050</u>	<u>1190</u>	<u>1710</u>	<u>1795</u>	<u>7108</u>
% Convicted with Discharge	83.	80.	80.	82.	80.	81.

**TABLE B-4: ANALYSIS OF ARMY GENERAL AND
(BAD-CONDUCT-DISCHARGE AUTHORIZED) SPECIAL
COURT-MARTIAL DATA (FISCAL YEARS 1971, 1972)**

	OFFENSES TRIED	CONVIC- TIONS	AWOL CHARGES*	CIVIL- TYPE OFFENSES	% UNDER 25 YEARS OLD
FY 1971 .	7807	82.3%	40.4%	42.9%	92.0%
FY1972 .	7142	80.4%	26.2%	53.9%	91.5%

* Many persons accused of AWOL, in *amicus*' experience, have been permitted to accept an Undesirable or General Discharge in lieu of standing trial, pursuant to Army Regulation AR 635-200, Chapter 10. *Amicus* would further note that recent liberalization of administrative policy has reduced the rate of AWOL trials and thus inversely affected the relative frequency of trials for civil-type offenses.

* * * * *

Counsel expresses deep gratitude to personnel in the United States Army Judiciary and in the Military Justice Division of the Office of the Judge Advocate General of the Navy who fully cooperated with counsel's request for the data presented herein, and did so on very short notice.

APPENDIX C

EFFECTS OF A DISCHONORABLE DISCHARGE: A CASE HISTORY

On January 13, 1945, William A. Manera, then sixteen years old but having misrepresented his age to a draft board, was inducted into the United States Army.

Private Manera, Serial Number 42 164 526, was subsequently trained and qualified at Fort Sill, Oklahoma, to drive various military vehicles, including 3/4 ton trucks. Upon reassignment to Korea, he was required to obtain further qualification to operate military vehicles for his new unit. He did not so qualify because of an alleged failure to use proper hand signals.

On July 27, 1947, Manera and five other soldiers were given permission to travel on leave by 3/4 ton truck to a point remote from post. The assigned driver of the truck, together with his companions, suggested Manera take the wheel. At their repeated urging, and with the knowledge that the Army had previously qualified him to drive such a vehicle, Manera assumed control of the truck and proceeded to operate it with due diligence.

At one point in the trip the truck hit a large hole in the road and went out of control. Manera attempted to brake its momentum, but the brakes failed. Manera reached for the hand brake, but because of his short stature and the handle's position, he momentarily lost sight of the road. Thereupon the truck went off an embankment at the entrance to a small bridge.

Two Korean children playing at the water's edge were struck by the truck. One suffered only minor injuries, but the other died a few days later despite Manera's carrying the child to a hospital.

Manera was tried by a general court-martial for various offenses related to this unfortunate incident. He pleaded not guilty, but was convicted and sentenced to a year in confinement at hard labor, total forfeitures and a dishonorable discharge. On review, the sentence and conviction were affirmed.

On June 28, 1947, Manera was released from confinement and received his dishonorable discharge certificate. On that occasion he was given an orientation lecture by a Major in the Army. He advised Manera that he could never re-enlist, he could not go on military property, he was not allowed to vote, he could not hold a Government job and he could not personally own "titles, lands and property." As Manera has said, the Major's description of the significance of the dishonorable discharge "distorted my mind."

Returning to civilian life, Manera experienced many hardships because of the dishonorable discharge. For one year he could not obtain employment. He became financially dependent upon his adoptive grandmother. Later he was to work for a year and a half as a printer's helper by concealing the fact of his military service and dishonorable discharge. He was still quite young and entirely believable when he asserted that he had never been in the armed forces.

He left that first job and travelled to California. There he once was arrested while riding with a friend in whose car Los Angeles police allegedly found marijuana. The charges against Manera were dismissed; the friend was later acquitted. The experience of the arrest, and the scornful attitude displayed by police officials upon learning of his dishonorable discharge, convinced Manera that he would be happier back home in New York. Manera obtained employment gluing valises. As soon as he had saved enough money to leave California, he quit that job and returned to New York. There he again obtained employment in a printing shop by concealing his military history.

Subsequently, his employer learned of the dishonorable discharge. Manera was fired. Ostensibly, the cause was his falsification of the job application.

He was next employed cleaning the interiors of airplanes, first for American Airlines, later for United. In each instance, he had falsified his employment application by concealing his military experiences.

While working for the airlines, he made application for a chauffeur's license. In that application he was candid about his dishonorable discharge. After a two year wait he received the license, and became eligible to drive a taxi. About a year later, while driving hacks part time, he was examined by one Captain Delaney of the New York City Police Department, who threatened revocation of the license because of the court-martial conviction and the California arrest. Manera filed a written statement in his defense. For a period of time he most anxiously awaited the results. He never heard further about the matter.

Since 1966 he has driven taxis as his sole source of income. He lives in fear of a revocation of his hack license.

Manera has never registered to vote in the belief that he is ineligible to do so. He has never served on a jury. He is unable to obtain a loan without a cosigner. He cannot afford the purchase of a home, although with GI benefits such a purchase would have been within his means. He was afflicted with malaria while in Korea, and has suffered occasional relapses subsequent to his discharge. He has been refused treatment in Veterans Administration hospitals for those attacks of malaria. His efforts to purchase a New York City taxi medallion (required for owners of licensed cabs, and valued in the neighborhood of \$15,000) were aborted upon the broker's learning that Manera had received a dishonorable discharge.

Aside from the legal and administrative restraints on his activities, Manera bears a moral scar of which he is deeply ashamed. "I can't stand up and argue with nobody," he complains. "I have a dishonorable discharge that can be thrown up to me at any time."

On one occasion Manera assisted in the apprehension of an armed assailant of a third party. When the arresting officer offered to obtain for him publicity respecting his heroism, and indicated that it could lead to improved employment opportunities, Manera insisted that he be kept out of the public eye. He was asked if he cared to testify when the assailant was brought to trial, but could not bring himself to do so, lest others hear of his dishonorable discharge. His children, aged 4 to 12, do not know about his dishonorable discharge. How could he enjoy their respect and love were they to know?

Manera's crime was not one of moral turpitude. Unintentional vehicular homicide occurs all too frequently in the civilian world, but never results in an equivalent loss of rights, privileges and self respect. Manera was only 17 years old when he was convicted. His record is otherwise unblemished. But he has been forced to live with the burden of his conviction and dishonorable discharge for the past twenty-five years. They will be his cross until death.

"I've been afraid, more than anything else," he notes. "I cannot make a move like a normal man makes a move."

VERIFICATION

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

William A. Manera, being duly sworn, deposes and says that he has read the foregoing account entitled "*Effects of a Dishonorable Discharge: a Case History*" and it is true to the best of his knowledge and belief.

/s/ WILLIAM A. MANERA

(William A. Manera)

SWORN AND SUBSCRIBED TO BEFORE ME
THIS 11th DAY OF OCTOBER, 1972.

/s/ MARILYN S. BROOK

(Marilyn S. Brook)

Notary Public, State of
New York, No. 31-5463725
Qualified in New York County.
Commission Expires March 30, 1974.

[RAISED SEAL]

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1398

JOHN W. WARNER, SECRETARY OF THE NAVY,
PETITIONER

v.

JOHN W. FLEMINGS

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

1. Respondent begins his argument from the same starting point as did the courts below, urging essentially that *O'Callahan v. Parker*, 395 U.S. 258, is entitled to retroactive effect because the decision announced a jurisdictional rule depriving military courts-martial of adjudicatory power to try non-service-connected crimes. For the reasons stated in our opening brief (pp. 11-17), we submit that the mechanical application of a "jurisdictional" label to *O'Callahan* does little to further the fundamental

inquiry presented in this case, and that the proper disposition of the retroactivity question should turn on an application of the same criteria that generally govern the decision of this question.

2. We have fully discussed in our main brief why those criteria warrant only prospective application of *O'Callahan* (pp. 18-38), and we do not repeat that discussion here. Respondent's discussion of our arguments focuses primarily on the differences between the military court-martial system prior to enactment of the Uniform Code of Military Justice in 1950 and the present system under the Code. But those shortcomings in the court-martial system of an earlier day should not, we submit, determine the effect now to be given to the rule in *O'Callahan*. That decision did not imply that either the pre-Code or the post-Code court-martial system was or is generally unfair and inadequate under the due process clause. Rather, the decision focused on two specific constitutional rights, the rights to grand jury indictment and to jury trial, and decided that, to maximize the availability of these rights, certain *kinds* of cases should not be tried by military courts. The relevant question thus is solely whether the absence of those two procedures—from pre-Code or post-Code military trials of “non-service-connected” offenses—has “* * * infect[ed] the integrity of the truth-determining process at trial * * *” by courts-martial. *Williams v. United States*, 401 U.S. 646, 655, n. 7, quoting *Stovall v. Denno*, 388 U.S. 293, 298.

Congress and the courts have apparently agreed that indictments and juries are not essential to reliable fact-finding in the military-justice system. The Uniform Code of Military Justice, while providing a number of trial protections to the accused servicemen not previously recognized in military prosecutions, imposes no statutory requirement that courts martial be tried before lay juries¹ or proceed only upon grand jury indictment.² Nor have the military courts, which in recent years have been particularly sensitive to protecting the rights of servicemen (see *Pet. Br. 22-27*), held that these two procedures are necessary for a fair disposition of the case. And, as we explained in our main brief (pp. 21-23), that also appears to be the view of this Court, as most recently reflected in its unanimous decision in *Relford v. Commandant*, 401 U.S. 355. In this regard, what a plurality of the Court said in *McKeiver v. Pennsylvania*, 403 U.S. 528, in concluding that due process does not require trial by jury in a juvenile court proceeding—despite the fact that “the juvenile system has been fraught with “disappointments,” “failures” and “shortcomings” (403 U.S. at 545)—is of equal relevance here (403 U.S. at 543):

* * * [O]ne cannot say that in our legal system the jury is a necessary component of accurate factfinding. There is much to be said for it, to be sure, but we have been content to pursue

¹ Compare Art. 25, U.C.M.J., 10 U.S.C. 825.

² Compare Art. 32, U.C.M.J., 10 U.S.C. 832.

other ways for determining facts. Juries are not required, and have not been, for example, in equity cases, in workmen's compensation, in probate, or in deportation cases. *Neither have they been generally used in military trials.* In *Duncan* [v. *Louisiana*, 391 U.S. 145] the Court stated, "We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury." 391 U.S. at 158. In *DeStefano* [v. *Woods*, 392 U.S. 631], for this reason and others, the Court refrained from retrospective application of *Duncan*, an action it surely would not have taken had it felt that the integrity of the result was seriously at issue. * * * [Emphasis added.]

3. Respondent makes the additional argument in his brief that, even if the Court should decide against him on the retroactivity issue or should conclude that the offense with which he was charged was service-connected, his court-martial conviction should be overturned because the trial was held in violation of his right to trial in the vicinage, as guaranteed by Article III, Sec. 2, cl. 3 of the Constitution (Resp. Br. 49-52).⁸ This claim is based on the fact that the

⁸ Article III, Sec. 2, cl. 3 provides:

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

court-martial proceeding involved here was convened at the Brooklyn Navy Yard in Brooklyn, New York, despite the fact that the alleged offense (auto theft) took place in New Jersey and respondent was apprehended by civilian authorities in Pennsylvania (see Pet. Br. 2-3).

It would be a sufficient answer to this argument to point out that respondent failed to raise any objection at his court martial on grounds of improper venue, and thus may properly be held to have waived whatever venue claim he might have had when he entered his guilty plea. See, e.g., *United States v. Dryden*, 423 F.2d 1175, 1178 (C.A. 5), certiorari denied, 398 U.S. 950; *United States v. Costello*, 381 F.2d 698, 701 (C.A. 2); *United States v. McMaster*, 343 F.2d 176, 181 (C.A. 6), certiorari denied, 382 U.S. 818; *United States v. Polin*, 323 F.2d 549, 556-557 (C.A. 3); *Hanson v. United States*, 285 F.2d 27, 28-29 (C.A. 9); *United States v. Fabric Garment Co.*, 262 F.2d 631, 641 (C.A. 2), certiorari denied, 359 U.S. 989.*

In any event, respondent's Article III claim to trial in the vicinage is not well-founded. Court-martial

*The argument was made for the first time in the present suit in the district court. That court, without passing on the question, expressed the view in dicta that respondent had "arguabl[y]" been denied the constitutional right to trial in the vicinage (Pet. App. B 53). The court of appeals (Pet. App. A7) did not reach the issue. Although the matter was not raised in our petition for certiorari or discussed in our main brief, we do not contest respondent's right to make the argument in this Court. See *Dandridge v. Williams*, 397 U.S. 471, 475, n. 6.

tribunals are legislative courts created by Congress under Article I of the Constitution (Art. I, Sec. 8). As such, their jurisdiction is independent of the judicial power created and defined in Article III. See *In re Vidal*, 179 U.S. 126, 127; *Dynes v. Hoover*, 20 How. 65, 79. As this Court stated in *Ex Parte Quirin*, 317 U.S. 1, 39:

Presentment by a grand jury and trial by a jury of the vicinage where the crime was committed were at the time of the adoption of the Constitution familiar parts of the machinery for criminal trials in the civil courts. But they were procedures unknown to military tribunals which are not courts in the sense of the Judiciary Article * * *.

Accordingly, in the military context at least, the Constitution does not require that servicemen be tried at the locale of the crime. It has long been recognized that the "jurisdiction of general courts-martial is coextensive with the territory of the United States." Winthrop, *Military Law and Precedents* 81 (1920 War Dept. Reprint). As that noted authority observed (*ibid.*), a military tribunal "assembled at any locality within that territory may legally take cognizance of an offence committed at any *other* such locality whatever, such a court, unlike a civil tribunal, not being restricted in the exercise of its authority to the limits of a particular State or other district or region." (Emphasis in original.)

The constitutional requirement of trial in the vicinage where the offense was committed has tra-

ditionally been associated only with trials by jury. Indeed, the Sixth Amendment to the Constitution, which in this regard particularizes the general directive of Article III, provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury of the State and district wherein the crime shall have been committed*, which district shall have been previously ascertained by law * * *. [Emphasis added.]

This provision, of course, has never been thought applicable to trials by military courts.⁵ The concept that the rights to jury trial and to trial in the vicinage are interrelated has its roots in early English history. See Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 Mich. L. Rev. 59, 94 (1944); Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 Harv. L. Rev. 293, 303-315 (1957). Those who live in the community where the crime is committed—which is frequently also the place of residence of the accused—have long been considered to be best situated to pass judgment on the validity of the charges brought. It is their “participation in the determination of guilt or innocence” (*Duncan v.*

⁵ It has long been held that “‘cases arising in the land or naval forces,’” which are expressly excepted from the operation of certain clauses of the Fifth Amendment, are also implicitly excepted from the Sixth Amendment’s guarantee of trial before a jury of the vicinage. See *Ex Parte Milligan*, 4 Wall. 2, 123, 138-139. Respondent advisedly does not premise his “trial in the vicinage” argument on the Sixth Amendment.

Louisiana, 391 U.S. 145, 156) that the vicinage rule is designed to obtain.

But in the military context, an application of that rule would be of little value. Members of the armed forces have no geographical "community" in the sense conceived by the constitutional provisions attending the right to jury trial for criminal offenses in civil courts. Their "community" is, as recognized in *Orloff v. Willoughby*, 345 U.S. 83, 94, a "specialized" one; it consists primarily of other servicemen (and their families), who come from all parts of the nation and are constantly moving about among a variety of military installations throughout the world.

Moreover, these transient servicemen and their families have never been the ones selected to sit in judgment at a court martial. It is well settled that the guarantee of trial by jury does not apply to military tribunals. See *O'Callahan v. Parker*, *supra*, 395 U.S. at 272-273; *Reid v. Covert*, 354 U.S. 1, 37; *Ex Parte Quirin*, *supra*, 317 U.S. at 38-40; *Ex Parte Milligan*, *supra*, 4 Wall. at 123; and see *id.* at 138-139 (concurring opinion). The trial is traditionally before a panel of commissioned or warrant officers, although now a limited number of enlisted men (no more than one-third of the total panel) may, if the accused makes a timely request, serve on the court-martial, so long as they are *not* members of the same unit as the accused (Art. 25, U.C.M.J., 10 U.S.C. 825(c)(1)).

In these circumstances, the place where the military trial is held is of marginal significance to the ac-

cused. The benefit of "community participation" that is derived from the vicinage requirement in civil prosecutions is simply inapplicable in a court-martial proceeding. There is no basis, therefore, either in constitutional history or in practical necessity, for adopting respondent's novel interpretation of the vicinage clause of Article III as applicable to courts martial.

Respondent is thus in no position to claim prejudice because his court martial was convened in New York rather than in New Jersey. While he asserts (Resp. Br. 52) that his trial outside the vicinage deprived him of an opportunity to subpoena civilian witnesses from a State other than the one in which the court martial occurred, he does not dispute the fact that he made no effort to obtain the depositions of out-of-state witnesses, which he could have done under Article 68 of the Articles for the Government of the Navy (34 U.S.C. (1946 ed.) 1200).^{*} This failure, coupled with his plea of guilty, precludes entertaining his present objection to the venue of the court martial whose judgment he is collaterally attacking. If the respondent had not pleaded guilty, the prosecution would have had to prove its case and the re-

^{*} The claim is particularly thin on the facts of this case where the offense took place in New Jersey but the evidence that respondent suggests might have been helpful (Resp. Br. 52) related to the circumstances surrounding his arrest in Pennsylvania. Thus, had he been tried by court martial in the district of the offense, he would not have been in any substantially different posture vis-a-vis obtaining witnesses from Pennsylvania.

spondent would have been able to cross-examine these witnesses. The respondent made the decision that no proof was required when he determined to plead guilty.

CONCLUSION

For the reasons stated herein and in our main brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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Solicitor General.

HENRY E. PETERSEN,
Assistant Attorney General.

PHILIP A. LACOVARA,
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SHIRLEY BACCUS-LOBEL,
Attorneys.

NOVEMBER 1972.

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

GOSA v. MAYDEN, WARDEN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 71-6314. Argued December 4, 1972—Decided June 25, 1973.*

In No. 71-6314, petitioner was tried by court-martial and convicted of rape. His conviction was affirmed by the Air Force Board of Review, and the Court of Military Appeals denied a petition for review. At no time during the trial and review proceedings did petitioner question the jurisdiction of the military tribunal. Thereafter, following the decision in *O'Callahan v. Parker*, 395 U. S. 258 (holding that when a serviceman is charged with a crime that is not "service connected" he is entitled to indictment by a grand jury and trial by jury in a civilian court), petitioner sought a writ of habeas corpus in Federal District Court which was denied, the court concluding that the standards promulgated in *Stovall v. Denno*, 388 U. S. 293, precluded retroactive application of *O'Callahan*. On appeal, in face of the Government's concession that the offense was not service connected, the Court of Appeals affirmed. In No. 71-1398, respondent, while absent without leave in 1944, was apprehended in Pennsylvania while in an automobile stolen in New Jersey. He was tried by court-martial in New York on charges of unauthorized absence from duty station during wartime and theft of an automobile from a civilian. He pleaded guilty, and after serving two years' confinement was dishonorably discharged in 1946. He instituted suit in 1970, relying on *O'Callahan*, seeking to compel the Secretary of the Navy to overturn his court-martial conviction for auto theft and to correct his military records with respect to his dishonorable discharge. The District Court held that the car theft was not service connected

*Together with No. 71-1398, *Warner, Secretary of the Navy v. Flemings*, on certiorari to the United States Court of Appeals for the Second Circuit.

Syllabus

in the *O'Callahan* sense and that *O'Callahan* was to be applied retroactively. The Court of Appeals affirmed. *Held*: The judgment in No. 71-6314 is affirmed, and the judgment in No. 71-1398 is reversed. Pp. 6-

No. 71-6314, 450 F. 2d 753, affirmed; No. 71-1398, 458 F. 2d 544, reversed.

MR. JUSTICE BLACKMUN, joined by THE CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE POWELL, concluded that:

1. The question in *O'Callahan* was the appropriateness of the exercise of jurisdiction by a military forum, pursuant to an Act of Congress, over a nonservice-connected offense when balanced against the guarantees of the Fifth and Sixth Amendments. Pp. 6-11.

2. Application of the three-pronged test of *Stovall v. Denno*, *supra*, "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards," requires that *O'Callahan* be accorded prospective effect only. Pp. 11-19.

3. Respondent's claim in No. 71-1398 that he was deprived of the right to trial in the vicinage, as guaranteed by Art. III, § 2, cl. 3, not raised before the military court, lacks merit. General court-martial jurisdiction, derived from Art. I, is not restricted territorially to a particular State or district; the vicinage requirement has primary relevance to trial by jury; and respondent has not demonstrated prejudice. P. 19.

MR. JUSTICE DOUGLAS concluded, in No. 71-6314, that the case should be reargued on the question whether the "jurisdiction" of the military tribunal, being not contested, had become *res judicata*; and in No. 71-1398, that respondent committed a "service connected" crime. Pp. 1-9.

MR. JUSTICE REHNQUIST concluded, in No. 71-6314, that although the prior Court decisions do not support the holding that *O'Callahan* should not be applied retroactively, *O'Callahan* was wrongly decided and should be overruled; and, in No. 71-1398, that any crime committed by a serviceman during the time of declared war is "service connected" and that he can be validly tried by court-martial for that offense. Pp. 1-2.

MR. JUSTICE STEWART concluded, in No. 71-1398, that respondent, a serviceman who deserted his post during a time of con-

Syllabus

gressionally declared war and stole an automobile was guilty of a "service connected" offense and was properly tried before a court-martial under *O'Callahan*. P. 1.

BLACKMUN, J., announced the Court's judgments and delivered an opinion in which BURGER, C. J., and WHITE and POWELL, JJ., joined. DOUGLAS, J., filed an opinion concurring in part. REHNQUIST, J., filed an opinion concurring in the judgments. STEWART, J., filed an opinion concurring in the result in No. 71-1398, in which DOUGLAS, J., joined, and dissenting in No. 71-6314. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, and in which STEWART, J., joined as it applies to No. 71-6314.

JOURNAL

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NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 71-6314 AND 71-1398

James Roy Gosa, Petitioner, 71-6314 v. J. A. Mayden, Warden.	} On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
John W. Warner, Secretary of the Navy, Petitioner, 71-1398 v. John W. Flemings.	} On Writ of Certiorari to the United States Court of Appeals for the Sec- ond Circuit.

[June 25, 1973]

MR. JUSTICE BLACKMUN announced the judgments of the Court and an opinion in which THE CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE POWELL join.

In *O'Callahan v. Parker*, 395 U. S. 258, decided June 2, 1969, this Court, by a 5-3 vote, held that when a person in military service is charged with a crime that is not "service connected," *id.*, at 272, the defendant is entitled, despite his military status, to the benefit of "two important constitutional guarantees," *id.*, at 273, namely, indictment by a grand jury¹ and trial by jury in a civilian court.

The Court noted that O'Callahan was "properly absent from his military base when he committed the crimes with which he is charged," *ibid.*; that there was no connection between his military duties and the crimes;

¹ The Court, of course, has not yet held the indictment requirement of the Fifth Amendment to be binding upon the States. *Hurtado v. California*, 110 U. S. 516 (1884); *Gaines v. Washington*, 277 U. S. 81, 86 (1928); *Branzburg v. Hayes*, 408 U. S. 665, 688 n. 25 (1972).

that the offenses were committed off the military post or enclave; that the victim was not performing any duty relating to the military; that the situs of the crimes was not occupied territory or under military control; that they were peacetime offenses; that the civilian courts were open; and that the offenses involved no question of the flouting of military authority, post security, or the integrity of military property.

Later, in *Relford v. Commandant*, 397 U. S. 934 (1970), we granted certiorari "limited to retroactivity and scope of *O'Callahan v. Parker*." When *Relford* was decided, 401 U. S. 355 (1971), we held that an offense committed on a military post by an individual in service, in violation of the security of another person or property on that post, was "service connected," within *O'Callahan's* language. *Relford's* offenses so qualified. His case, thus, went off on the scope of *O'Callahan* and did not reach the issue of retroactivity. We concluded that the latter issue, although having "important dimensions, both direct and collateral," was "better resolved in other litigation where, perhaps, it would be solely dispositive of the case." *Id.*, at 370. One of the cases, *Gosa*, now before us presents that issue solely. The other case, *Flemings*, presents the issue, but not solely.

I

No. 71-6314. In December 1966 petitioner James Roy Gosa, an airman third class, stationed at Warren Air Force Base in Wyoming, was tried by a court-martial and convicted of rape, in violation of Art. 120 of the Uniform Code of Military Justice, 10 U. S. C. § 920.

The offense took place the preceding August, in what the respondent has stated to be peacetime,² when Gosa was in the city of Cheyenne. At the time, he was offi-

² Tr. of Oral Arg. 16.

cially off duty and absent from the base on authorized leave. He was not in uniform. The victim was not connected with the military or related to military personnel. Shortly after the incident Gosa was arrested by civilian authorities. He was unable to make bond and was detained pending a preliminary hearing. The complaining witness did not appear at the hearing. Gosa, accordingly, was released. He was taken into military custody, however, and charged with the Art. 120 violation. A general court-martial was convened. Gosa was tried and convicted. He was sentenced to 10 years' imprisonment at hard labor, forfeiture of pay and allowances, reduction in rank to the lowest pay grade of airman basic, and a bad conduct discharge. As required by Art. 61 of the Code, 10 U. S. C. § 861, the convening authority then referred the case to his staff judge advocate for review. The staff judge advocate's recommendation that the findings and sentence of the general court-martial be approved were adopted by the convening authority. Pursuant to Art. 66 of the Code, 10 U. S. C. § 866, the case was referred to an Air Force Board of Review. That Board affirmed the conviction and sentence. On August 16, 1967, the United States Court of Military Appeals denied a petition for review. 17 U. S. C. M. A. 648. The case thereupon became final, Art. 76 of the Code, 10 U. S. C. § 876, subject, of course, to the habeas corpus exception recognized in *United States v. Augenblick*, 393 U. S. 348, 349-350 (1969).

At no time throughout the trial and the review proceedings did Gosa raise any question as to the power of the military tribunal to try him.

Following the Court's decision in *O'Callahan*, Gosa filed an application for a writ of habeas corpus in the United States District Court for the Northern District of Florida seeking his release from the Federal Correctional Institute at Tallahassee where he was then con-

fined.³ Subsequently, he filed with the United States Court of Military Appeals a motion to vacate his sentence and conviction; this was treated as a petition for reconsideration and was denied by a divided vote with accompanying opinions. 19 U. S. C. M. A. 327 (1970). The habeas application also was denied by the District Court upon its determination that the standards promulgated in *Stovall v. Denno*, 388 U. S. 293, 297 (1967), and related cases, precluded retroactive application of *O'Callahan*. 305 F. Supp. 1186 (ND Fla. 1969). On appeal, in the face of a Government concession that the alleged offense was not service connected, the Court of Appeals for the Fifth Circuit, one judge dissenting, affirmed. 450 F. 2d 753 (1971).

No. 71-1398. In 1944, when the United States was formally at war, respondent James W. Flemings, then age 18 and a seaman second class, was stationed at the Naval Ammunition Depot in New Jersey. On August 7 of that year Flemings failed to return on time from an authorized three-day leave. He was apprehended by Pennsylvania police while he was in an automobile stolen two days earlier in Trenton, New Jersey. Flemings was turned over to military authorities. He was charged with unauthorized absence from his duty station during wartime and with theft of an automobile "from the possession of . . . a civilian."⁴

³ Gosa has since been released. Inasmuch as the District Court possessed federal habeas jurisdiction when Gosa's application was filed, that jurisdiction was not defeated by his release prior to the completion of proceedings on the application. *Carafas v. LaVallee*, 391 U. S. 234, 238-240 (1968).

⁴ It appears that the automobile was owned by a member of the Signal Corps but that the car was being used by him on a purely personal errand when it was stolen. The owner was not compensated by the military for its use.

A court-martial was convened at the Brooklyn Navy Yard. Flemings, represented by a reserve lieutenant, pleaded guilty to the two charges. He was sentenced to three years' imprisonment, reduction in rank to apprentice seaman, and dishonorable discharge. After two years' confinement he was released and was dishonorably discharged in October 1946.

In 1970, Flemings instituted suit in the United States District Court for the Eastern District of New York, relying on *O'Callahan* and seeking to compel the Secretary of the Navy to overturn the 1944 court-martial conviction for auto theft and to correct his military records with respect to the dishonorable discharge. He did not challenge the validity of his conviction for being absent without leave.

The District Court held that the auto theft offense was not service connected in the *O'Callahan* sense and that *O'Callahan* was to be applied retroactively to invalidate the court-martial conviction on that charge. 330 F. Supp. 193 (EDNY 1971). The Court of Appeals for the Second Circuit affirmed. 458 F. 2d 544 (1972).

We granted certiorari in both cases to resolve the conflict. 407 U. S. 920, 919 (1972).⁵

⁵ See also *Schlomann v. Moseley*, 457 F. 2d 1223 (CA10 1972), petition for certiorari pending; *Thompson v. Parker*, 308 F. Supp. 904, 907-908 (MD Pa. 1970), appeal dismissed (CA3, No. 18868, 1970); and *Mercer v. Dillon*, 19 U. S. C. M. A. 264, 265 (1970), where the Court of Military Appeals confined the application of *O'Callahan* to those convictions that were not final when *O'Callahan* was decided on June 2, 1969.

Scholarly comment on *O'Callahan* retrospectivity is divided. The following predict or favor nonretroactivity: Everett, *O'Callahan v. Parker*—Milestone or Millstone in Military Justice?, 1969 Duke L. J. 853, 886-889; Nelson and Westbrook, Court-Martial Jurisdiction Over Servicemen for "Civilian" Offenses: An Analysis of *O'Callahan v. Parker*, 54 Minn. L. Rev. 1, 39-46 (1969); Note,

II

O'Callahan v. Parker, to use the words MR. JUSTICE STEWART employed in *Desist v. United States*, 394 U. S. 244, 248 (1969), was "a clear break with the past." In *O'Callahan* the Court concluded that, in harmonizing the express guarantees of the Fifth and Sixth Amendments, with respect to grand jury indictment and trial by a civilian jury, with the power of Congress, under Art. I, § 8, cl. 14, of the Constitution, "To make Rules for the Government and Regulation of the land and naval Forces," a military tribunal ordinarily may not try a serviceman charged with a crime that has no service connection. Although the Court in *O'Callahan* did not expressly overrule any prior decision, it did announce a new constitutional principle, and it effected a decisional change in attitude that had prevailed for many decades. The Court long and consistently had recognized that military status in itself was sufficient for the exercise of court-martial jurisdiction. *Kinsella v. Singleton*, 361 U. S. 234, 240-241, 243 (1960); *Reid v. Covert*, 354 U. S. 1, 22-23 (1957); *Grafton v. United States*, 206 U. S. 333, 348 (1907); *Johnson v. Sayre*, 158 U. S. 109, 114 (1895);

44 Tulane L. Rev. 417, 423-424 (1970); Note, 50 Tex. L. Rev. 405 (1972); Note, 47 St. John's L. Rev. 235 (1972); Note, 3 Loyola U. (L. A.) L. Rev. 188, 198 n. 67 (1970); Comment, 21 S. C. L. Rev. 781, 793-794 (1969). The following predict or favor retroactivity; Blumenfeld, Retroactivity After *O'Callahan*: An Analytical and Statistical Approach, 60 Geo. L. J. 551 (1972); Wilkinson, The Narrowing Scope of Court-Martial Jurisdiction: *O'Callahan v. Parker*, 9 Washburn L. J. 193, 197-201 (1970); Higley, *O'Callahan* Retroactivity: An Argument for the Proposition, 27 JAG Journal 85, 96-97 (1972); Note, 22 Baylor L. Rev. 64, 75 (1970); Note, 64 Nw. U. L. Rev. 930, 938 (1970). See Birnbaum and Fowler, *O'Callahan v. Parker*: The Relford Decision and Further Developments in Military Justice, 39 Ford. L. Rev. 729, 739-742 (1971).

A compilation of general comments on *O'Callahan* appears in *Relford v. Commandant*, 401 U. S. 355, 356 n. 1 (1971).

Smith v. Whitney, 116 U. S. 167, 184-185 (1886); *Coleman v. Tennessee*, 97 U. S. 509 (1879); *Ex parte Milligan*, 4 Wall. 2, 123 (1866). Indeed, in *Grafton*, 206 U. S., at 348, the Court observed, "While . . . the jurisdiction of general courts-martial extends to all crimes, not capital, committed against public law by an officer or soldier of the Army within the limits of the territory in which he is serving, this jurisdiction is not exclusive, but only concurrent with that of the civil courts."

The new approach announced in *O'Callahan* was cast, to be sure, in "jurisdictional" terms, but this was "lest 'cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger,' as used in the Fifth Amendment, be expanded to deprive every member of the armed services of the benefits of an indictment by a grand jury and a trial by a jury of his peers" (footnote omitted). 395 U. S., at 272-273. The Court went on to emphasize that the "power of Congress to make 'Rules for the Government and Regulation of the land and naval Forces,' Art. I, § 8, cl. 14, need not be sparingly read in order to preserve those two important constitutional guarantees. For it is assumed that an express grant of general power to Congress is to be exercised in harmony with express guarantees of the Bill of Rights." *Id.*, at 273. The basis for the "jurisdictional" holding in *O'Callahan* obviously was the increasing awareness and recognition of the important constitutional values embodied in the Fifth and Sixth Amendments. Faced with the need to extend the protection of those Amendments as widely as possible, while at the same time respecting the power of Congress to make "Rules for the Government and Regulation of the land and naval Forces," the Court, *id.*, at 265, heeded the necessity for restricting the exercise of jurisdiction by military tribunals to those crimes with a service connection as an appropriate and beneficial

limitation "to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service." *Toth v. Quarles*, 350 U. S. 11, 22 (1955).

That *O'Callahan* dealt with the appropriate exercise of jurisdiction by military tribunals is apparent from *Kinsella v. Singleton*, *supra*, where the Court ruled that the Necessary and Proper Clause, Art. I, § 8, cl. 18, does not enable Congress to broaden the term "land and naval Forces" in Art. I, § 8, cl. 14, to include a civilian dependent accompanying a member of the armed forces overseas. In such a case, it was held, a civilian dependent is entitled to the safeguards of Art. III and of the Fifth and Sixth Amendments, and conviction by court-martial is not constitutionally permissible:

"But the power to 'make Rules for the Government and Regulation of the land and naval Forces' bears no limitation as to offenses. The power there granted includes not only the creation of offenses but the fixing of the punishment therefor. If civilian dependents are included in the term 'land and naval Forces' at all, they are subject to the full power granted the Congress therein to create capital as well as noncapital offenses. This Court cannot diminish and expand that power, either on a case-by-case basis or on a balancing of the power there granted Congress against the safeguards of Article III and the Fifth and Sixth Amendments. Due process cannot create or enlarge power It deals neither with power nor with jurisdiction, but with their exercise." 361 U. S., at 246.

Although the decision in *O'Callahan* emphasizes the difference in procedural protections respectively afforded by the military and the civilian tribunals, the Court certainly did not hold, or even intimate, that the prosecution

in a military court of a member of the armed services for a nonservice connected crime was so unfair as to be void *ab initio*. Rather, the prophylactic rule there formulated "created a protective umbrella serving to enhance" a newly recognized constitutional principle. *Michigan v. Payne*, — U. S. —, — (1973). That recognition and effect are given to a theretofore unrecognized and uneffectuated constitutional principle does not, of course, automatically mandate retroactivity. In *Williams v. United States*, 401 U. S. 646, 651 (1971), MR. JUSTICE WHITE made it clear, citing *Linkletter v. Walker*, 381 U. S. 618 (1965), that the Court has "firmly rejected the idea that all new interpretations of the Constitution must be considered always to have been the law and that prior constructions to the contrary must always be ignored." See *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U. S. 371, 374 (1940). And in *Johnson v. New Jersey*, 384 U. S. 719, 728 (1966), it was said that "the choice between retroactivity and nonretroactivity in no way turns on the value of the constitutional guarantee involved."

Duncan v. Louisiana, 391 U. S. 145 (1968), and *Bloom v. Illinois*, 391 U. S. 194 (1968), are illustrative of the context of the *O'Callahan* decision. In *Duncan*, the Court held that since "trial by jury in criminal cases is fundamental to the American scheme of justice, . . . the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee" (footnote omitted). 391 U. S., at 149. In *Bloom* the Court held that serious criminal contempts may not be summarily punished and that they are subject to the Constitution's jury trial provision. 391 U. S., at 201-210. In those two cases the Court ruled that a state court exercising jurisdiction over a defendant in a serious criminal or criminal contempt case,

but failing to honor a request for a jury trial, in effect was without jurisdiction. Yet in *DeStefano v. Woods*, 392 U. S. 631 (1968), the Court by a *per curiam* opinion, denied retroactive application to those new constitutional holdings. The Court thus concluded that it did not follow that every judgment rendered in a *Duncan* or in a *Bloom* situation, prior to the decisions in those cases, was so infected by unfairness as to be null and void.

The same analysis has pertinent application to these very similar cases, and it leads us to the conclusion that the validity of convictions by military tribunals, now said to have exercised jurisdiction inappropriately over non-service connected offenses is not sufficiently in doubt so as to require the reversal of all such convictions rendered since 1916 when Congress provided for military trials for civilian offenses committed by persons in the armed services. Act of August 29, 1916, c. 418, 39 Stat. 619, 652.

The clearly opposing and contrasting situation is provided by the argument made by respondent Flemings to the effect that the retroactivity of *O'Callahan* is to be determined and is controlled by *United States v. U. S. Coin & Currency*, 401 U. S. 715 (1971). In that case the Court held that its decisions in *Marchetti v. United States*, 390 U. S. 39 (1968), and *Grosso v. United States*, 390 U. S. 62 (1968), precluding the criminal conviction of a gambler who properly asserted his Fifth Amendment privilege against self-incrimination as a reason for his failure to register and to pay the federal gambling tax, would be applied retroactively so as to invalidate forfeiture proceedings under 26 U. S. C. § 7302 ensuing upon the invalid conviction. To suggest that *Coin & Currency* is controlling is to ignore the important distinction between that case and these. There* the Court determined that retrospective application of *Marchetti* and *Grosso* was required because they "dealt with the kind

of conduct that cannot constitutionally be punished in the first instance," 401 U. S., at 723; it was conduct "constitutionally immune from punishment" in any court. *Id.*, at 724.

In *O'Callahan*, on the other hand, the offense was one for which the defendant was not so immune in any court. The question was not whether *O'Callahan* could have been prosecuted; it was, instead, one related to forum, that is, whether, as we have said, the exercise of jurisdiction by a military tribunal, pursuant to an act of Congress, over his nonservice connected offense was appropriate when balanced against the important guarantees of the Fifth and Sixth Amendments. The Court concluded that in the circumstances there presented the exercise of jurisdiction was not appropriate, and fashioned a rule limiting the exercise of court-martial jurisdiction in order to protect the rights to indictment and jury trial. The Court did not hold that a military tribunal was and always had been without authority to exercise jurisdiction over a nonservice connected offense.

III

The foregoing conclusion, of course, does not end our inquiry as to whether *O'Callahan* should be accorded retroactive application.

In two cases decided earlier this Term, retrospectivity of a new constitutional decision was also an issue. *Robinson v. Neil*, 409 U. S. 505 (1973), concerned successive municipal and state prosecutions for alleged offenses arising from the same circumstances, and a claim of double jeopardy, based on this Court's intervening decisions in *Benton v. Maryland*, 395 U. S. 784 (1969), and *Waller v. Florida*, 397 U. S. 387 (1970). We recognized that in *Linkletter* the Court was "charting new ground" in the retrospectivity area, 409 U. S., at 507, that "*Linkletter* and succeeding cases," *ibid.*, obviously

including *Stovall v. Denno*, 388 U. S. 293, 297 (1967), established standards for determining retroactivity; that *Robinson*, however, did not readily lend itself to the *Linkletter* analysis; that *Linkletter* and its related cases dealt with procedural rights and trial methods; and that guarantees not related to procedural rules "cannot, for retroactivity purposes, be lumped conveniently together in terms of analysis." 409 U. S., at 508.

In *Michigan v. Payne*, — U. S. — (1973), we were concerned with the retroactivity of *North Carolina v. Pearce*, 395 U. S. 711 (1969), and the standards it promulgated with respect to an increased judge-imposed sentence on retrial after a successful appeal. We there employed the *Stovall* criteria and held that *Pearce* was not to be applied retroactively.

In the present cases we are not concerned, of course, with procedural rights or trial methods, as is exemplified by the decisions concerning the exclusionary rule (*Linkletter*), the right of confrontation (*Stovall*), adverse comment on a defendant's failure to take the stand (*Tehan v. Shott*, 382 U. S. 406 (1966)), and a confession's admissibility (*Johnson v. New Jersey*, 384 U. S. 719 (1966)). But neither are we concerned, as we were in *Robinson*, with a constitutional right that operates to prevent another trial from taking place at all. Our concern, instead, is with the appropriateness of the exercise of jurisdiction by a military forum.

These cases, therefore, closely parallel *DeStefano v. Woods*, *supra*, where the Court denied retroactive application to *Duncan v. Louisiana*, *supra*, and *Bloom v. Illinois*, *supra*, in each of which a right to a jury trial had been enunciated. In denying retroactivity, the integrity of each of the earlier proceedings, without a jury, was recognized. The test applied in *DeStefano* was the *Stovall* test. 392 U. S., at 633-635. Similarly here,

then, the three-prong test of *Stovall* has pertinency, and we proceed to measure Gosa's and Fleming's claims by that test directed to "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." 388 U. S., at 297.

A. *Purpose*. "Foremost among these factors is the purpose to be served by the new constitutional rule." *Desist v. United States*, 394 U. S. 244, 249 (1969). In his opinion for the plurality in *Williams v. United States*, 401 U. S., at 653, MR. JUSTICE WHITE emphasized that where "the major purpose of new constitutional doctrine is to overcome" a trial aspect "that substantially impairs its truth-finding function," the new rule is given complete retroactive effect, and "neither good-faith reliance" nor "severe impact on the administration of justice" suffices to require prospectivity.

Our initial concern, therefore, is whether the major purpose of the holding in *O'Callahan* was to overcome an aspect of military trials which substantially impaired the truth-finding process and brought into question the accuracy of all the guilty verdicts rendered by military tribunals. At the same time, however, the fact that a new rule tends incidentally to improve or enhance reliability does not in itself mandate the rule's retroactive application. The Court in *Johnson v. New Jersey*, 384 U. S., at 728, repeated what had been suggested in *Linkletter* and *Tehan*, that "we must determine retroactivity 'in each case' by looking to the peculiar traits of the specific 'rule in question'" and

"Finally, we emphasize that the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree

We are thus concerned with a question of probabilities and must take account, among other factors, of the extent to which other safeguards are available to protect the integrity of the truth-determining process at trial." 384 U. S., at 728-729.

See *Michigan v. Payne*, — U. S., at — (slip opinion p. 8). Thus, retroactivity is not required by a determination that the old standard was not the most effective vehicle for ascertaining the truth, or that the truth-determining process has been aided somewhat by the new standard, or that one of several purposes in formulating the new standard was to prevent distortion in the process.

Although the opinion in *O'Callahan* was not uncritical of the military system of justice, and stressed possible command influence and the lack of certain procedural safeguards, 395 U. S., at 263-266, the decision there, as has been pointed out above, certainly was not based on any conviction that the court-martial lacks fundamental integrity in its truth-determining process.* Indeed, our subsequent ruling in *Relford* itself indicates our conclusion that military criminal proceedings are not basically unfair, for *Relford* clearly approves prosecution in a mili-

* There are some protections in the military system not afforded the accused in the civilian counterpart. For example, Art. 32 of the Code, 10 U. S. C. § 832, requires "thorough and impartial investigation" prior to trial, and prescribes for the accused the rights to be advised of the charge, to have counsel present at the investigation, to cross-examine adverse witnesses there, and to present exonerating evidence. It is not difficult to imagine, also, the situation where a defendant, who is in service, may well receive a more objective hearing in a court-martial than from a local jury of a community that resents the military presence.

The Uniform Code of Military Justice was not in effect when *Flemings* was charged and pleaded guilty. But the fact that his proceeding took place under the present Code's predecessor is no inevitable indication of basic unfairness. See *Burns v. Wilson*, 346 U. S. 137 (1953).

tary court, of what is otherwise a civilian crime, when factors are present that establish the offense's "service connection." 401 U. S., at 364-365. See Mr. Chief Justice Warren's paper, *The Bill of Rights and the Military*, 37 N. Y. U. L. Rev. 181, 188-189 (1962).

It, of course, would demean the constitutional rights to indictment and trial by a jury to assert that those guarantees do not play some role in assuring the integrity of the truth-determining process. "[T]he right to jury trial generally tends to prevent arbitrariness and repression." *DeStefano v. Woods*, 392 U. S., at 633. The same mission is fulfilled by the indictment right. But a policy directed at the prevention of arbitrariness and repression is not confined to the truth-determining process. It is concerned, as well, with a larger range of possible evils: prosecution that is malicious, prosecutorial overzealousness, excessiveness of sentence, and the like. These very ingredients were also present in the background in *Duncan and Bloom*. Yet, the Court did not find it necessary to hold retroactive the rights newly established by those cases.

Nothing said in *O'Callahan* indicates that the major purpose of that decision was to remedy a defect in the truth-determining process in the military trial. Rather, the broad guarantees of the Fifth Amendment right to grand jury indictment and the Sixth Amendment right to jury trial weighed heavily in the limitation of the exercise of court-martial jurisdiction to "the least possible power adequate to the end proposed," *Toth v. Quarles*, 350 U. S., at 23, a phrase taken from *Anderson v. Dunn*, 6 Wheat. 204, 231 (1821).

The purpose behind the rule enunciated in *O'Callahan* thus does not mandate retroactivity.

B. *Reliance*. With respect to this factor, we repeat what has been emphasized above, namely, that, before *O'Callahan*, the law was settled that the exercise of

military jurisdiction over an offense allegedly committed by a member of the armed forces was appropriately based on the military status of the defendant and was not dependent on the situs or nature of the offense. There was justifiable and extensive reliance by the military and by all others on the specific rulings of this Court. Military authorities were acting appropriately pursuant to provisions of the Uniform Code of Military Justice, Art. 2, 10 U. S. C. § 802, and its predecessors, and could not be said to be attempting to usurp civilian authority. The military is not to be faulted for its reliance on the law as it stood before *O'Callahan* and for not anticipating the "clear break with the past" that *O'Callahan* entailed. The reliance factor, too, favors prospectivity.

C. *Effect on the Administration of Justice.* In *DeStefano v. Woods*, 392 U. S., at 634, the Court, in considering the retroactivity of *Duncan* and *Bloom*, attached special significance to the fact that "the effect of a holding of general retroactivity on law enforcement and the administration of justice would be significant, because the denial of jury trial has occurred in a very great number of cases." The very same factor is present with like significance here, for the military courts have been functioning in this area since 1916, appropriately assuming from this Court's successive holdings, that they were properly exercising jurisdiction in cases concerning nonservice connected offenses allegedly committed by servicemen.

A mere glance at the reports of the United States Court of Military Appeals discloses the volume of prosecutions in military tribunals. Retrospective application of *O'Callahan* would not only affect the validity of many criminal convictions but would result in adjust-

ments and controversy over back pay, veterans' benefits, retirement pay, pensions, and other matters. In addition, the task of establishing a service connection on the basis of a stale record or in a new trial would prove formidable if not impossible in many cases, since at the time the record was made the question whether there was a service connection was of no importance.

Gosa and Flemings press upon us a recent law review article. Blumenfeld, *Retroactivity After O'Callahan: An Analytical and Statistical Approach*, 60 Geo. L. J. 551 (1972). The author of that article concludes: (1) On the basis of a sampling of cases reviewed by the Court of Military Appeals and the Army Court of Military Review between June 2, 1969 (the date of *O'Callahan*), and December 31, 1970, only about 1% of the general court-martial cases were service connected. *Id.*, at 580, n. 147. (2) "[V]ery few" servicemen have sought collateral review of their convictions since *O'Callahan* was decided. *Id.*, at 578, n. 141. The author asserts, however, "Even if the number of requests for relief sent to military departments should exceed expectations, the Defense Department, with an abundance of personnel and computers, could develop procedures to insure a quick review." *Id.*, at 572. (3) The military has necessary machinery to process claims and petitions for review. *Id.*, at 571-575. (4) The financial impact of a ruling of retroactivity would not be great since most servicemen convicted of nonservice connected crimes would not be entitled to retirement or pension pay and that, in any event, the average return should not exceed \$1,500. *Id.*, at 574-575.

In *Mercer v. Dillon*, 19 U. S. C. M. A. 264 (1970), the United States Court of Military Appeals, a tribunal composed of civilian judges, 10 U. S. C. § 867, but uniquely familiar with the military system of justice,

spoke in another vein.' A pertinent factor, too, is that until *Flemings'* case emerged in the Second Circuit, the civilian and the military courts had ruled against applying *O'Callahan* retroactively; thus there was no decisional impetus to encourage litigation.

We must necessarily also consider the impact of a retroactivity holding on the interests of society when the new constitutional standard promulgated does not bring into question the accuracy of prior adjudications of guilt. Wholesale invalidation of convictions rendered years ago could well mean that convicted persons would be freed without retrial, for witnesses, particularly military ones, no longer may be readily available, memories may have faded, records may be incomplete or missing, and physical evidence may have disappeared. Society must not be made to tolerate a result of that kind when there is no significant question concerning the accuracy of the

"We recognize that not all the persons possibly entitled to review and relief would have the initiative or a sufficient financial interest to justify the time and expense of bringing suits or applications. A reliable estimate of the number of court-martial convictions that could be overturned by a retroactive application of *O'Callahan* is nearly impossible to secure. For the one fiscal year of 1968, the Army, the Navy, and the Air Force conducted approximately 74,000 special and general courts-martial. If only the smallest fraction of these courts-martial and those conducted in the other years since 1916 involved an *O'Callahan* issue, it is an understatement that thousands of courts-martial would still be subject to review. The range of relief could be extensive, involving such actions as determinations by the military departments of whether the character of discharges must be changed, and consideration of retroactive entitlement to pay, retired pay, pensions, compensation, and other veterans' benefits. Among the difficulties would be the necessity of reconstructing the pay grade that a member of the armed forces would have attained except for the sentence of the invalidated court-martial, a task complicated by the existence of a personnel system involving selection of only the best qualified eligibles and providing for the elimination of others after specified years of service." 19 U. S. C. M. A., at 267-268.

process by which judgment was rendered or, in other words, when essential justice is not involved.

We conclude that the purpose to be served by *O'Callahan*, the reliance on the law as it stood before that decision, and the effect of a holding of retroactivity, all require that *O'Callahan* be accorded prospective application only. We so hold.*

IV

Flemings also urges that, because his court-martial proceeding was convened in Brooklyn, whereas the auto theft took place in New Jersey and his arrest in Pennsylvania, he was deprived of the right to a trial in the vicinage, as guaranteed by Art. III, § 2, cl. 3, of the Constitution. This claim was not raised before the military court. Moreover, a military tribunal is an Article I legislative court with jurisdiction independent of the judicial power created and defined by Article III. *Ex parte Quirin*, 317 U. S. 1, 39 (1942); *Whelchel v. McDonald*, 340 U. S. 122, 127 (1950); *Kennedy v. Mendoza-Martinez*, 372 U. S. 144, 165 (1963). General court-martial jurisdiction is not restricted territorially to the limits of a particular State or district. W. Winthrop, *Military Law and Precedents* 104-105 (2d ed., 1896). And the vicinage requirement has primary relevance to trial by jury. In any event, Flemings has demonstrated no prejudice.

The judgment in No. 71-6314 is affirmed; that in No. 71-1398 is reversed.

It is so ordered.

* In Flemings' case, the Secretary argues, in the alternative, that *O'Callahan* does not require the invalidation of the auto theft conviction because the offense was committed while the respondent was absent without leave during wartime. For that reason, it is said, the offense was service connected under the rationale of *Relford*. In view of our holding on the issue of retroactivity, we do not reach, and need not resolve, this alternative argument.

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[June 25, 1973]

MR. JUSTICE DOUGLAS, concurring in part.

I agree with MR. JUSTICE STEWART that respondent Flemings committed a "service connected" crime.¹

As to the *Gosa* I think the case should be put down for reargument on whether *res judicata* controls the disposition of the case. The argument that it does goes as follows:

Petitioner Gosa was tried for rape before a military tribunal and convicted. The case went through the hierarchy of review within the military establishment and after the conviction and sentence were affirmed, a petition for review was filed with the Court of Military Appeals (a civilian court created by Congress); but that court denied review.² The events described took place in

¹ In the *Flemings* case respondent in time of war went AWOL and stole a car from a civilian. The military charge against him was an unauthorized absence from his duty station during wartime and theft of a car from a civilian. He pleaded guilty; and the only action brought came years later when he sought correction of his military records.

² The Code of Military Justice, after providing for investigation

1966 and 1967. On June 2, 1969, we decided *O'Callahan v. Parker*, 395 U. S. 258, invalidating the court-martial conviction for rape committed off the military base by a serviceman who was on leave.

O'Callahan in that respect is on all fours with the instant case, for here petitioner was officially off-duty, in civilian clothes, and was found to have raped a civilian in no way connected with the military, while he was in Cheyenne, Wyoming, near Warren Air Force Base but not on the base.

O'Callahan was decided in 1969 and in reliance on it petitioner Gosa started this habeas corpus action³ seeking release from his confinement under the military sentence.

before a charge is referred to a general court-martial in Art. 32 (a), goes on to state in Art. 32 (b):

"The accused shall be advised of the charges against him and of his right to be represented at that investigation by counsel. Upon his own request he shall be represented by civilian counsel if provided by him, or military counsel of his own selection if such counsel is reasonably available, or by counsel detailed by the officer exercising general court-martial jurisdiction over the command. At that investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after the investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides and a copy thereof shall be given to the accused."

Petitioner had counsel before the Court of Military Appeals, one designated by the Army; and only "the merits" of the conviction was raised, no question relating to the "jurisdiction" of the military.

³ 10 U. S. C. § 876 provides that military review of court-martial convictions shall be "final and conclusive" and "binding upon all . . . courts . . . of the United States." As we noted in *United States v. Augenblick*, 393 U. S. 348, 349-350, relief by way of habeas corpus is an exception to that Finality Clause. *

It was suggested by the Solicitor General in his brief in opposition to a motion for leave to file a petition for writ of certiorari in

The question whether one of our constitutional decisions should be retroactively applied has been before us on numerous occasions. *Linkletter v. Walker*, 381 U. S. 618; *Stovall v. Denno*, 388 U. S. 293, 297; *Desist v. United States*, 394 U. S. 244; *DeStefano v. Woods*, 392 U. S. 631.

But in all cases to date which involved retroactivity the question has been whether the court whose judgment is being reviewed should be required in the interests of substantial justice to retry the accused under the new constitutional rule announced by the Court after the first trial had been completed but before the new constitutional decision was announced. The measure applied as to whether the new rule should be prospective or retroactive⁴ was the three-pronged test stated in *Stovall v. Denno*, 388 U. S. 293, 297: "The criteria guiding resolu-

Crawford v. United States, 380 U. S. 970, that while the statutes made the judgment of the Court of Military Appeals "final and conclusive," habeas corpus would be available to a person confined and a writ of error *coram nobis* in the District Court if he is not confined; citing 25 U. S. C. § 1254 (c); *Hiatt v. Brown*, 339 U. S. 103, 106, n. 1. In that view one who was unsuccessful in obtaining relief by way of *coram nobis* in the district court, would be able to seek review in the court of appeals and ultimately by certiorari in this Court. That question was not resolved by this Court, since we denied certiorari in the *Crawford* case. In the *Crawford* case the question tendered on the merits was the restriction of court-martial membership to senior noncommissioned officers, excluding entire classes of statutorily eligible prospective court members, deprived petitioner of due process and violated 10 U. S. C. § 825 so as to deprive the court-martial of jurisdiction. For the decision of the Court of Military Appeals see *United States v. Crawford*, 15 U. S. C. M. A. 31. And see Schiesser, Trial by Peers, 15 Cath. U. L. Rev. 171 (1966).

⁴ The Court of Military Appeals decided that *O'Callahan v. Parker* would be applied only to those convictions that were not final before the date of that decision. *Mercer v. Dillon*, 19 U. S. C. M. A. 264 (1970).

tion of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

Here the question is whether a civilian, rather than a military, tribunal should have tried him. Does the question whether the "jurisdiction"⁵ of the military tribunal can be contested at this late date turns on whether *res judicata* bars that inquiry?

Petitioner Gosa in the review of his conviction by the military tribunal never raised the question raised in *O'Callahan*.⁶ If he was "constitutionally immune from punishment" in any court, we would have the problem presented in *United States v. Coin & Currency*, 401 U. S. 715, 723-724. But petitioner was not tried by a kangaroo court or by eager vigilantes but by military authorities within the framework established by Congress in the Uniform Code of Military Justice.

The case is somewhat unlike *McClaughry v. Deming*, 186 U. S. 49, where a court-martial was constituted of officers of the regular army who by an Act of Congress were not authorized to sit in judgment on volunteers.

⁵ For purposes of habeas corpus, historically used to test the "jurisdiction" of tribunals to try defendants, the concept has been broadened to include constitutional guarantees. Thus in *Johnson v. Zerbst*, 304 U. S. 458, compliance with the constitutional mandate that an accused is entitled to counsel was held to be "an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty." *Id.*, at 467. The rule announced used "jurisdiction" in an innovative way with the purpose of giving defendants who up to the time of our decisions in *Gideon v. Wainwright*, 372 U. S. 908, and *Argersinger v. Hamlin*, 407 U. S. —, had no lawyers to represent them and thus were commonly deprived of their constitutional rights.

⁶ See n. 2, *supra*.

The court-martial was held incompetent to sit on the case because it acted in plain violation of an Act of Congress. There was therefore no tribunal authorized by law to render the challenged judgment. Consent to be so tried could not confer jurisdiction in face of the mandate of the statute. In the present cases Congress by express provisions of the Code had authorized the military tribunals to sit in these types of cases.

In *Chico County District v. Baxter State Bank*, 308 U. S. 371, municipal debts were readjusted by a federal district court under an Act of Congress which this Court later held to be unconstitutional. The latter ruling was in *Ashton v. Cameron County District*, 298 U. S. 513, where a closely divided Court held that an extension of the Bankruptcy Act to include a readjustment of the debts of municipalities and counties was unconstitutional. Petitioner had its debts readjusted under that Act, which permitted less than all of the outstanding bondholders to agree to a plan. That plan was consummated before the *Ashton* decision. Respondent was one of the non-consenting bondholders. After the *Ashton* decision it brought suit on its bonds. The question before the Court in the *Chicot County District* case was the extent to which the *Ashton* case should be made retroactive. The Court, speaking through Chief Justice Hughes, said that the proceedings in the District Court "were conducted in complete conformity to the statute" and that "no question had been raised as to the irregularity of the court's action." *Id.*, at 375. Since the parties had an opportunity to raise the question of invalidity but did not do so, they "were not the less bound by the decree because they failed to raise it." *Ibid.* Chief Justice Hughes added, at 377:

"Whatever the contention as to jurisdiction may be, whether it is that the boundaries of a valid statute have been transgressed, or that the statute itself is

invalid, the question of jurisdiction is still one for judicial determination. If the contention is one as to validity, the question is to be considered in the light of the standing of the party who seeks to raise the question and of its particular application."

He went on to say, at 378

"... *res judicata* may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding 'but also as respects any other available matter which might have been presented to that end.'" *Grubb v. Public Utilities Commission*, 281 U. S. 470, 479.

Petitioner claims, as did respondent in the *Chico County District* case, that the tribunal that first adjudicated the cause acted unconstitutionally. At the time the military court acted, however, it was assumed to have "jurisdiction" and its "jurisdiction" was in no way challenged in the review proceedings available to petitioner. Did the issue of "jurisdiction" for that case therefore become *res judicata*?

These are, in brief, the reasons why *res judicata* arguably should lead to an affirmance in the *Gosa* case. Contrary to intimations in the dissenting opinion I have reached no position on the merits and would reserve judgment until the issue was fully explored on reargument.

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[June 25, 1973]

MR. JUSTICE REHNQUIST, concurring in the judgment.

I do not believe that decisions of this Court would support a holding that the rule announced in *O'Callahan v. Parker*, 395 U. S. 258 (1969), should not be applied retroactively to court-martial convictions entered before the decision in that case. In *O'Callahan*, the Court clearly held that courts-martial did not have jurisdiction to try servicemen for "non-service connected" crimes. For substantially the reasons stated by my Brother MARSHALL, I believe that *Robinson v. Neil*, 409 U. S. 505 (1973), and prior decisions mandate that *O'Callahan* be applied retroactively.

In No. 71-6314, since I believe that the *O'Callahan* rule could not in any event be given only prospective application, the question arises whether the analytical inquiry sanctioned by that decision should even be undertaken. *O'Callahan*, was, in my opinion, wrongly decided, and I would overrule it for the reasons set forth by Mr. Justice Harlan in his dissenting opinion. 395 U. S., at 274-284.

In No. 71-1398, even if *O'Callahan* were followed, I agree with the views of my Brother STEWART. The offense was committed during a period of declared war, and furthermore while respondent was absent without official leave from his military duties. For purposes of the "service connected"—"non-service connected" dichotomy announced by *O'Callahan*, I would hold that any crime committed by a member of the Armed Forces during time of war is "service connected," and that he can validly be tried by a court-martial for that offense. Cf. *Relford v. Commandant*, 401 U. S. 355 (1971).

I therefore concur in the judgments of the Court, and would affirm the judgment of the Court of Appeals in No. 71-6314 and reverse that in No. 71-1398.

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[June 25, 1973]

MR. JUSTICE STEWART, dissenting in No. 71-6314, *Gosa v. Mayden*, and, joined by MR. JUSTICE DOUGLAS, concurring in the result in No. 71-1398, *Warner v. Flemings*.

I dissented in *O'Callahan v. Parker*, 395 U. S. 258, 274 (1969), and continue to believe that that case was wrongly decided. Until or unless *O'Callahan* is overruled, however, I think it must be given fully retroactive application for the reasons stated in my Brother MARSHALL's persuasive dissenting opinion, *post*. Accordingly, I join his dissenting opinion as it applies to 71-6314, *Gosa v. Mayden*.

But that view, in my opinion, does not dispose of No. 71-1398, *Warner v. Flemings*. I think that a serviceman who deserts his post during a time of congressionally declared war and steals an automobile is guilty of a "service-connected" offense. Accordingly, I conclude that the respondent Flemings was properly tried before a court-martial under *O'Callahan*. Cf. *Relford v. Commandant*, 401 U. S. 355, 365 (1971). For this reason I concur in the result reached by the Court in the *Flemings* case.

In No. 71-1398, even if *O'Callahan* were followed, I agree with the views of my Brother STEWART. The offense was committed during a period of declared war, and furthermore while respondent was absent without official leave from his military duties. For purposes of the "service connected"—"non-service connected" dichotomy announced by *O'Callahan*, I would hold that any crime committed by a member of the Armed Forces during time of war is "service connected," and that he can validly be tried by a court-martial for that offense. Cf. *Relford v. Commandant*, 401 U. S. 355 (1971).

I therefore concur in the judgments of the Court, and would affirm the judgment of the Court of Appeals in No. 71-6314 and reverse that in No. 71-1398.

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[June 25, 1973]

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John W. Flemings.		

[June 25, 1973]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEWART* join, dissenting.

I

MR. JUSTICE BLACKMUN's plurality opinion, by its efforts to establish that *O'Callahan v. Parker*, 395 U. S. 258 (1969), was not a decision dealing with jurisdiction in its classic form, implicitly acknowledges that if *O'Callahan* were in fact concerned with the adjudicatory power—that is, the jurisdictional competency¹—of military tribunals, its holding would necessarily be fully retroactive in effect, cf. *e. g.*, *Linkletter v. Walker*, 381 U. S. 618, 623 (1965). The plurality now puts forth the view that *O'Callahan* was not concerned with the true jurisdictional competency of courts-martial but that the decision yielded merely a new constitutional rule. This characterization of *O'Callahan* permits the plurality to

*MR. JUSTICE STEWART joins this opinion only as it applies to No. 71-6314. See *ante*, at —.

¹See generally ALI Restatement of the Law of Judgments, comment to § 7, at 41-46 (1942).

apply in this case the three-prong test employed to judge the retroactivity of new procedural rules under *Linkletter* and its progeny, see, e. g., *Desist v. United States*, 394 U. S. 244, 249 (1969); *Stovall v. Denno*, 388 U. S. 293, 297 (1967). And, not surprisingly, application of that test leads to the conclusion that *O'Callahan* should have only prospective effect. With all due respect, I must dissent.

I am unable to agree with the plurality's characterization of *O'Callahan*. In my view, it can only be understood as a decision dealing with the constitutional limits of the military's adjudicatory power over offenses committed by servicemen. No decision could more plainly involve the limits of a tribunal's power to exercise jurisdiction over particular offenses and thus more clearly demand retroactive application.

A

In holding that *O'Callahan* is to be given only prospective effect, the plurality does not reject outright the view that the decision was jurisdictional in nature. Yet it clearly does reject the contention that *O'Callahan* dealt with a question of true jurisdictional competency, for we are told that the decision "did announce a new constitutional principle," *ante*, at 6, and that it really "dealt with the appropriate exercise of jurisdiction by military tribunals," *ante*, at 8. The difference between a decision concerning a tribunal's jurisdictional competency—that is, the limits of its adjudicatory power—and "the appropriate exercise of [its] jurisdiction" is less than clear to me, at least where, as here, the question of "appropriateness" ultimately turns on the extent of Congress' constitutional authority under Art. I, § 8, cl. 14, to "make Rules for the Government and Regulation of the land and naval Forces." But whatever the nature of the distinction that the plurality now seeks to

draw, it cannot, in my opinion, obscure the essential character of the decision in *O'Callahan*.

O'Callahan required this Court to define the class of offenses committed by servicemen that Congress, under Art. I, § 8, cl. 14, could constitutionally empower military tribunals to try. The nature of the ultimate inquiry there is plain from the question upon which the Court granted certiorari: "Does a court-martial, held under the Articles of War, Tit. 10, U. S. C. § 801 *et seq.*, have jurisdiction to try a member of the Armed Forces who is charged with commission of a crime cognizable in a civilian court and having no military significance, alleged to have been committed off-post and while on leave, thus depriving him of his constitutional rights to indictment by grand jury and trial by a petit jury in a civilian court?" 395 U. S., at 261. The *O'Callahan* Court's discussion of this issue was consistently couched in terms of the jurisdiction of military tribunals;² and in dissent, Mr. Justice Harlan, too, framed the issue presented in the unmistakable terms of "the appropriate subject-matter jurisdiction of courts-martial," *id.*, at 276. Even the Court of Appeals in No. 71-6314, while ultimately holding the *O'Callahan* decision to be prospective only, acknowledged that the decision turned upon a determination of "lack of adjudicatory power"—that "*O'Callahan's* foundation, framework and structure deny to the legislation which breathed the breath of judicial life into the forum that tried Sgt. *O'Callahan*, the necessary basis in constitutional power to reach his type of case."³ 450

² See 395 U. S., at 265, 267, 269, 272.

³ In *Relford v. Commandant*, 401 U. S. 355, 356 (1971), MR. JUSTICE BLACKMUN, speaking for the Court, described the *O'Callahan* decision as follows:

"In *O'Callahan* . . . , by a five-to-three vote, the Court held that a court-martial may not try a member of our armed forces charged with attempted rape of a civilian, with housebreaking, and with assault with intent to rape, when the alleged offenses were

F. 2d 753, 757 (CA5 1971). See also *United States ex rel. Flemings v. Chafee*, 458 F. 2d 544, 549-550 (CA2 1972).

Despite the evident jurisdictional nature of the ultimate issue presented in *O'Callahan*, the plurality attempts to analogize this case to *DeStefano v. Woods*, 392 U. S. 631 (1968), where the Court held that the decisions in *Duncan v. Louisiana*, 391 U. S. 145 (1968), and *Bloom v. Illinois*, 391 U. S. 194 (1968), were to have only prospective effect. *Duncan* held that the Sixth Amendment guarantee of trial by jury in criminal cases had been made applicable to the States by the Fourteenth Amendment. And *Bloom* established the right to jury trial in the context of serious criminal contempt proceedings. *DeStefano*—like the other offspring of *Linkletter* that have applied the three-prong test to determine retroactivity—involved constitutional rulings that established new procedures for the conduct of trial or for the use of evidence. But *O'Callahan* hardly was such a case.

The Court in *O'Callahan* was not setting forth procedures which the military was constitutionally required to adopt in its proceedings. Had the Court been doing so, this would certainly be a different case; the analogy to *DeStefano* then might well be appropriate. It is true, as the plurality now points out, that the *O'Callahan* Court placed considerable emphasis on the lack of jury trial in the court-martial system. But it did so only as a part of the general analytic process of determining the proper reconciliation of the competing jurisdictions of two essentially distinct⁴ judicial systems, namely, the civil and

committed off-post on American territory, when the soldier was on leave, and when the charges could have been prosecuted in a civilian court."

⁴ A serviceman convicted by a court-martial does, of course, ultimately have access to the federal judicial system by way of a petition for federal habeas corpus. See, e. g., *Burns v. Wilson*, 346 U. S. 137 (1953); *Gusik v. Schilder*, 340 U. S. 128 (1950).

military systems of justice. The Court's basic concern in this process was the preservation—to the fullest extent possible consistent with the legitimate needs of the military—of the fundamental civil rights guaranteed by our Constitution and Bill of Rights. Those civil rights were, in the Court's words, the "constitutional stakes in the . . . litigation." 395 U. S., at 262.

Thus, the Court pointed out that one tried before a military tribunal is without the benefit of not only trial by jury but also indictment by a grand jury. 395 U. S., at 262. Nor are the same rules of evidence and procedure applicable in a military proceeding, a factor affecting, for example, the defense's access to compulsory process, *id.*, at 264 n. 4. In addition, the Court was concerned with the fact that the presiding officers at courts-martial do not enjoy the independence that is thought to flow from life tenure and undiminishable salary. To the contrary, the Court recognized that "the possibility of influence on the actions of the court-martial by the officer who convenes it, selects its members and the counsel on both sides, and who usually has direct command authority over its members is a pervasive one in military law, despite strenuous efforts to eliminate the dangers." *Id.*, at 264. In short, the Court concluded that "[a] court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved," *Id.*, at 265.

The Court's purpose in considering these factors was not to require changes in the military system of justice, but rather to illustrate its "fundamental differences from . . . the civilian courts," *id.*, at 262, differences that compelled the Court "to restrict military tribunals to the narrowest jurisdiction absolutely essential to maintaining discipline among troops in active service," *id.*, at 265, quoting from *Toth v. Quarles*, 350 U. S. 11, 22-23

(1955). As a result, the Court concluded that the "crime to be under military jurisdiction must be service connected . . .," *id.*, at 272, so that the power of Congress under Art. I, § 8, cl. 14, to "make Rules and the Government and Regulation of the land and naval Forces," and also the exemption from the grand jury requirement of the Fifth Amendment for "cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or of public danger" are not expanded to deprive servicemen unjustifiably of their civil rights.⁵ The Court found that when an offense is not service connected, the needs of the military are not significantly implicated and thus that the limits of Congress' constitutional power over servicemen under Art. I, § 8, cl. 14, have been passed, at least in the context of "peacetime offenses," *id.*, at 273.

Certainly the jurisdictional nature of the *O'Callahan* decision is amply demonstrated by this Court's previous decision in *McClaghry v. Deming*, 186 U. S. 49 (1902). There the Court was called upon to decide "the power of an officer convening a court-martial for the trial of an officer of the volunteers [reserve troops], to compose that court entirely of officers of the Regular Army."

⁵ Indeed, even if the military voluntarily elected to provide servicemen on trial before courts-martial with the full panoply of procedural rights constitutionally required in civil forums, that would not affect the decision in *O'Callahan*. Implicit in *O'Callahan* is the fact that the military system of justice has never been understood to be constitutionally compelled to provide many of the procedural rights afforded by the civil courts, and thus it would always remain free to provide only that which is constitutionally necessary. It was with an understanding of what is constitutionally required, not of what the military might elect to provide, that the scope of Congress' power under Art. I, § 8, cl. 14, had to be, and was, defined in *O'Callahan*, see 395 U. S., at 261-262. It is this fact that perhaps best demonstrates the true jurisdictional—as opposed to procedural—nature of that decision.

Id., at 53. The Court determined that Congress had directed by statute that volunteer officers of the Army be tried only by court-martial composed of volunteer officers. In light of this determination the Court concluded:

"As to the officer to be tried there was no court, for it seems to us that it cannot be contended that men, not one of whom is authorized by law to sit, but to the contrary all of whom are forbidden to sit, can constitute a legal court-martial because detailed to act as such court by an officer who in making such detail acted contrary to and in complete violation of law. Where does such a court obtain jurisdiction to perform a single official function? How does it get jurisdiction over any subject-matter or over the person of any individual? The particular tribunal is a mere creature of statute, as we have said, and must be created under its provisions."

Id., at 64.

In the same vein, the Court elsewhere stated: "A court-martial is the creature of statute, and, as body or tribunal, it must be convened and constituted in entire conformity with the provisions of the statute, or else it is without jurisdiction." *Id.*, at 62. Because of the flaw in the composition of the court-martial, a flaw which the Court considered determinative on the issue of the court-martial's jurisdiction, the Court affirmed a lower court's issuance of a writ of habeas corpus to secure the officer's release from military custody. Significantly, this writ was issued at a time when habeas corpus clearly lay only where the court-martial had "no jurisdiction over the person of the defendant or the subject-matter of the charges against him." *Id.*, at 69.* In *O'Callahan* the

* See also *Developments in the Law—Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1209 (1970). The Court moved beyond the jurisdictional limitation on collateral attacks upon court-martial con-

Court was not concerned with the composition of a particular court-martial, but with the fundamental question of the extent of Congress' constitutional power to establish court-martial jurisdiction over offenses committed by our servicemen. If the former issue goes to the jurisdiction of military tribunals, certainly the latter does.

B

With this understanding of *O'Callahan*, I believe, contrary to the plurality's view, that the retroactive application of our holding there is required by our prior decisions in *Robinson v. Neil*, 409 U. S. 505 (1973), and *United States v. United States Coin & Currency*, 401 U. S. 715, 722-724 (1971). *Robinson* involved the retroactive application of the decision in *Waller v. Florida*, 397 U. S. 387 (1970), that the Fifth Amendment's guarantee, made applicable to the States through the Fourteenth Amendment, that no person should be put twice in jeopardy for the same offense barred an individual's prosecution for a single offense by both a State and a municipality of the State, that is, a legal subdivision of the State. *United States Coin & Currency* held retroactive the Court's prior determination that the Fifth Amendment privilege against compulsory self-incrimination barred the prosecution of gamblers for failure to register and to report illegal gambling proceeds for tax purposes, see *Marchetti v. United States*, 390 U. S. 39 (1968); *Grosso v. United States*, 390 U. S. 62 (1968).

In deciding whether to give retroactive effect to *Waller*, *Marchetti*, and *Grosso*, the Court rejected contentions that it should apply to three-prong test employed in cases such as *Stovall*, *Desist*, and *DeStefano*. In *United*

victions in *Burns v. Wilson*, 346 U. S. 137 (1953). See *Developments in the Law—Federal Habeas Corpus*, *supra*, at 1215-1216.

States Coin & Currency, Mr. Justice Harlan, speaking for the Court, explained:

"Unlike some of our earlier retroactivity decisions, we are not here concerned with the implementation of a procedural rule which does not undermine the basic accuracy of the factfinding process at trial. *Linkletter v. Walker*, 381 U. S. 618 (1965); *Tehan v. Shott*, 382 U. S. 406 (1966); *Johnson v. New Jersey*, 384 U. S. 719 (1966); *Stovall v. Denno*, 388 U. S. 293 (1967). Rather *Marchetti* and *Grosso* dealt with the kind of conduct that cannot constitutionally be punished in the first instance." 401 U. S., at 723.

The *Robinson* Court adopted essentially the same view of the *Waller* decision concerning the Double Jeopardy Clause and multiple prosecutions by different legal subdivision of a single sovereign. See 409 U. S., at 508. In this case, too, we are concerned not with "the implementation of a procedural rule," but with an unavoidable constitutional impediment to the prosecution of particular conduct.

In *O'Callahan*, as has been seen, the ultimate issue was the extent of the constitutional power that underlies the jurisdiction of military tribunals. Where an offense lies outside the limits of that power, there exists just as much of a constitutional impediment to trial by court-martial as there existed to a civil trial in *Marchetti* and *Grosso* due to the privilege against self-incrimination or in *Waller* due to the Double Jeopardy Clause. It cannot be forgotten that military tribunals are courts of limited jurisdiction. See *McClaghry v. Deming*, 186 U. S., at 63; *Ex parte Watkins*, 3 Pet. 193, 209 (1830). They cannot exercise authority which Congress has not conferred upon them, much less authority which Congress is without

constitutional power to confer.' It is this fundamental principle that compels retroactive application of the decision in *O'Callahan*.

The plurality seeks to distinguish *United States Coin & Currency* and *Robinson* on the grounds that the former involved a right that prevented the offender from being tried at all and the latter a right that prevented "another trial from taking place at all," *ante*, at 12, whereas the underlying issue in this case is merely which jurisdiction can try offenses committed by servicemen. But these are distinctions without meaning; they merely reflect the differences in the nature of the constitutional impediment to trial at issue in each case. The essential common thread tying these cases together is that each involved, at the least, a constitutional barrier to trial before the particular forum, regardless of the fairness of the procedures and the factfinding process of the relevant forum.

United States Coin & Currency swept broadly, to be sure, for it concerned a constitutional guarantee that effectively prevented any trial of the offender for the par-

¹ Cf. ALI Restatement of the Law of Judgments, comment b to § 7, at 42-43 (1942):

"There are many situations in which a court lacks competency to render a judgment. Thus, although a State has jurisdiction to grant a divorce of parties domiciled within the State, a decree of divorce rendered by a court which is not empowered to entertain suits for divorce is void. Similarly, a judgment rendered by a justice of the peace is void if under the law of the State such justices are not empowered to deal with the subject matter of the action; as, for example, where the action is one for tort and justices of the peace are given no power except in actions of contract. So also, where a court is given power to deal with actions involving no more than a designated amount, the statute limiting the amount is ordinarily construed not merely to make erroneous a judgment rendered by such a court in excess of its power, but to make such judgment void."

ticular offense. But the nature of the Double Jeopardy Clause at issue in *Robinson* is such that the offender may be tried once for a particular offense by a court of a particular sovereign; it is the second prosecution for the same offense by another court of the same sovereign that that Clause clearly bars. Similarly here, a serviceman charged with a non-service-connected offense is subject to trial for that offense by civil tribunals, but military tribunals lack the necessary constitutional power, at least in peacetime, to try such an offense. As was true in *Robinson*, this case involves a constitutional barrier to adjudication of a particular offense by a particular forum, yet in neither case does it follow that the offender is constitutionally entitled to go unpunished altogether. I fail to see therefore why different rules than those applied only recently in *Robinson* should be applied in this case.

There is, of course, the additional fact that the *Robinson* Court left open the question whether reasonable, official reliance upon a particular rule might properly be considered "in determining retroactivity of a non-procedural constitutional decision such as *Waller*." 409 U. S., at 511.^{*} And in this case the plurality, in attempting to establish that *O'Callahan* was a "'clear break with the past,'" *ante*, at 6, citing *Desist v. United States*, 394 U. S., at 248, and should therefore be applied only prospectively, does make much of the argument that substantial, justifiable reliance was placed on pre-*O'Callahan* law concerning the exercise of court-martial jurisdiction over servicemen, see *ante*, at 6-7. But I seriously question the relevance of any inquiry into official reliance on prior law where, as here, the issue is jurisdictional com-

^{*} In *Robinson* itself, the Court concluded that, in all events, there was no substantial element of reliance since "*Waller* cannot be said to have marked a departure from past decisions of this Court." 409 U. S., at 510.

petency. Even assuming for the moment that *O'Callahan* completely reinterpreted the limits of Congress' power to confer jurisdiction on courts-martial, the decision involved the authoritative construction of a constitutional provision and no military tribunal could ever constitutionally have had more power than resided therein. But the real point is that *O'Callahan* did not mark a sharp, new departure from prior law.

The plurality acknowledges that *O'Callahan* did not involve the overruling of any prior precedent, *ante*, at 6. It is true, as the plurality indicates, that a number of prior decisions had suggested that "military status in itself was sufficient for the exercise of court-martial jurisdiction," *ante*, at 6. Yet none of the cases upon which the plurality relies dealt in fact with a nonservice-connected offense committed by a serviceman in peacetime.⁹ It is fair to say, in short, that until *O'Callahan*

⁹ *Kinsella v. Singleton*, 361 U. S. 234 (1960), *Reid v. Covert*, 354 U. S. 1 (1957), and *Ex parte Milligan*, 4 Wall. 2 (1866), dealt with the exercise of military jurisdiction to try civilians, not servicemen. In each case, the Court held that the military lacked jurisdiction to try the civilians.

In *Grafton v. United States*, 206 U. S. 333 (1907), the Court held that a soldier who had been acquitted by a properly convened court-martial of a charge of homicide growing out of the shooting of a civilian while he was on guard duty in the Philippine Islands could not thereafter be tried and convicted for the same offense by a civilian court of that Territory. *Johnson v. Sayre*, 158 U. S. 109 (1895), involved the court-martial conviction of a navy paymaster, whom the Court found to be in the naval service of the United States, for embezzling naval funds while serving on a receiving ship of the United States Navy. And in *Smith v. Whitney*, 116 U. S. 167 (1886), the Court was asked to order that a writ of prohibition be issued against a court-martial convened to try a naval pay inspector essentially for making various contracts not in the best interest of the Navy, for failing properly to enforce contractual agreements with the Navy, for compelling payment of illegal contractual claims against the Navy, and for failing to perform his

the Court had not directly faced the issue of the service-connected nature of servicemen's offenses.

More importantly, perhaps, the *O'Callahan* Court's efforts to define the constitutional limits of the jurisdiction of courts-martial was hardly the beginning of such efforts by the Court. *O'Callahan* was but one of a series of steps taken by this Court since the conclusion of the Second World War to restrict military jurisdiction to its constitutionally appropriate limits. Thus, in *Toth v. Quarles*, 350 U. S. 11 (1955), the Court ruled that a discharged serviceman could not be tried by a court-martial for offenses committed while a member of the Armed Forces. Subsequently, it was established that courts-martial did not have jurisdiction to try offenses committed by civilian dependents accompanying military personnel serving overseas. *Kinsella v. Singleton*, 361 U. S. 234 (1960); *Reid v. Covert*, 354 U. S. 1 (1957). Finally, the Court held that civilians employed with the military overseas were not subject to court-martial jurisdiction. See *Grisham v. Hogan*, 361 U. S. 278 (1960); *McElroy v. Guagliardo*, 361 U. S. 281 (1960). This series of cases limited the reach of courts-martial to members of the

duties and responsibilities. There can be little question that each of the offenses in *Grafton*, *Johnson*, and *Smith*, was "service connected" within the meaning of *O'Callahan*. Contrast *Relford v. Commandant*, 401 U. S. 355, 365 (1971).

Finally, *Coleman v. Tennessee*, 97 U. S. 509 (1879), involved the court-martial conviction of a soldier for the murder of a civilian woman. The particular circumstances of the murder are not apparent from the Court's opinion, but it is clear that the crime occurred during the Civil War, that is, during wartime, rather than during peacetime, see *id.*, at 516-517. *O'Callahan* did not clearly speak with respect to constitutional limits of court-martial jurisdiction during wartime since the offense at issue there had occurred in peacetime, and the plurality does not reach the issue of wartime offenses today, although it arguably is presented in No. 71-1398, see *ante*, at 19 n. 8.

Armed Forces; they did not require the Court to go on to define the breadth of offenses for which servicemen could be tried by courts-martial. Nonetheless, these cases and *O'Callahan* clearly were all pieces of the same cloth. Under these circumstances, I seriously doubt that retro-active application would do substantial violence to any legitimate, official reliance upon prior law¹⁰—even assuming that to be a valid consideration here.¹¹

II

MR. JUSTICE DOUGLAS, in his concurring opinion, contends that petitioner Gosa's case merits reargument to

¹⁰ With regard to the question of official reliance, it has been pointed out that as long ago as 1955 the Departments of Justice and Defense reached an agreement that at least federal offenses committed by servicemen off-post would fall within the jurisdiction of the Justice Department while those committed on-post would be within the jurisdiction of the Defense Department:

"The Departments of Justice and Defense have found it desirable to establish ground rules for determining the forum for trying a serviceman charged with a civil offense in violation of both military and federal law. In general, these rules, which were established by agreement between the Departments in 1955, give to the military department concerned the responsibility of investigating and prosecuting offenses committed by persons subject to the Uniform Code of Military Justice and involving as victims only those persons or their civilian dependents residing on the military installation in question." Duke and Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 Vand. L. Rev. 435, 455 (1960), citing Army Reg. 22-160, Oct. 7, 1955, implementing Memorandum of Understanding Between the Departments of Justice and Defense Relating to the Prosecution of Crimes Over Which the Two Departments have Concurrent Jurisdiction (July 19, 1955).

¹¹ Since a majority of the Court does not find it necessary to reach the Secretary's additional argument in No. 71-1398 that the auto theft there at issue was service connected because the offense took place while respondent was absent without leave during wartime, I think it inappropriate for me to express any view on that additional argument at this time.

consider whether he should be denied relief because he failed to raise his jurisdictional objection before the court-martial that tried him. MR. JUSTICE DOUGLAS intimates that since the jurisdiction of the military to try petitioner was not initially contested, "*res judicata* [may now bar] inquiry" into the question of jurisdiction, *ante*, at 4. In my opinion, such an argument is clearly untenable, and hence reargument of petitioner Gosa's case is unnecessary.

A

One of the most basic principles of our jurisprudence is that subject-matter jurisdiction cannot be conferred upon a court by consent of the parties. See, *e. g.*, *American Fire & Casualty Co. v. Finn*, 341 U. S. 6, 17-18 (1951); *Industrial Addition Assn. v. Commissioner*, 323 U. S. 310, 313 (1945); *People's Bank v. Calhoun*, 102 U. S. 256, 260-261 (1881); *Cutler v. Rae*, 7 How. 729, 731 (1849).¹² An objection to the adjudicatory power of a tribunal may generally be raised for the first time at any stage of the litigation.¹³ See, *e. g.*, *Flast v. Cohen*, 392 U. S. 83, 88 n. 2 (1968); *United States v. Griffin*, 303 U. S. 226, 229 (1938); *Fortier v. New Orleans National Bank*, 112 U. S. 439, 444 (1884). Those principles are applicable even in the context of collateral attacks upon court-martial proceedings, as is evident from this Court's decision in *McClaghry v. Deming*, *supra*.

McClaghry, as previously indicated, involved a collateral attack upon the court-martial conviction of a volunteer officer who claimed that the regular Army court-martial which had tried him had been constituted in violation of the relevant law and therefore was without jurisdiction. The volunteer officer had failed to raise this jurisdictional objection before the court-martial, and

¹² See also ALI Restatement of the Law of Judgments, comment d to § 7, at 45 (1942).

¹³ Contrast n. 15, *infra*.

the military contended before this Court that "his consent waived the question of invalidity," 186 U. S., at 66. The Court rejected his contention saying:

"It was not mere consent to waive some statutory provision in his favor which, if waived, permitted the court to proceed. His consent could no more give jurisdiction to the court, either over subject-matter or over his person, than if it had been composed of a like number of civilians The fundamental difficulty lies in the fact that the court was constituted in direct violation of the statute, and no consent could confer jurisdiction over the person of the defendant or over the subject-matter of the accusation, because to take such jurisdiction would constitute a plain violation of law." *Id.*, at 66. See also *id.*, at 68; *Givens v. Zerbst*, 255 U. S. 11, 20 (1921); *Ver Mehren v. Sirmeyer*, 36 F. 2d 876, 879-880 (CA8 1929).

Just as the silence of the accused in *McClaghry* could not confer jurisdiction on a court-martial of the regular Army that was acting in excess of its statutory authority, so here the failure of Gosa to raise his jurisdictional objection before the court-martial could not have conferred upon that tribunal authority that constitutionally could not be conferred. Consequently, his failure to object to the jurisdiction of the court-martial that tried him cannot be deemed fatal in this Court.¹⁴

¹⁴ MR. JUSTICE DOUGLAS would seem inclined to limit unwaivable jurisdictional flaws to instances in which an accused is "tried by a kangaroo court or by eager vigilantes . . .," *ante*, at 4. But the presence or absence of adjudicatory power does not turn only on the fairness of the proceeding afforded by a particular forum; rather, as *McClaghry* adequately illustrates, jurisdictional competency in the context of courts of limited jurisdiction such as courts-martial necessarily involves the limits of the statutory and constitutional

B

Moreover, even if *O'Callahan* were to be treated as merely a procedural rather than as a true jurisdictional decision, application of the doctrine of *res judicata* would nonetheless be entirely inappropriate in the context of petitioner Gosa's case since that action was brought by way of a petition for federal habeas corpus. Specifically, I must vigorously disagree with the suggestion, necessarily inherent in MR. JUSTICE DOUGLAS' opinion, that the doctrine of *res judicata* may have some place in the law of federal habeas corpus. In the past, this Court has indicated quite explicitly to the contrary:

"At common law the doctrine of *res judicata* did not extend to a decision on *habeas corpus* refusing to discharge the prisoner. The State courts generally have accepted that rule where not modified by statute . . . ; and this Court has conformed to it and thereby sanctioned it. . . . We regard the rule as well established in this jurisdiction."

Salinger v. Loisel, 265 U. S. 224, 230 (1924); see *Fay v. Noia*, 372 U. S. 391, 423 (1963); *Darr v. Burford*, 339 U. S. 200, 214 (1950). Indeed, the rule was still "well established in this jurisdiction" just a few months ago.¹⁵

authority that provides the legal underpinnings for such tribunals. See also *Hiatt v. Brown*, 339 U. S. 103, 111 (1950); and n. 7, *supra*.

¹⁵ For this reason, I believe that MR. JUSTICE DOUGLAS' reliance on *Chicot County Drainage District v. Baxter State Bank*, 308 U. S. 371 (1940), is clearly misplaced insofar as petitioner Gosa's case is concerned. *Chicot County* involved a question concerning the extent of indebtedness on certain municipal bonds which had previously been the subject of a federal proceeding to readjust indebtedness under the bankruptcy laws. Following the readjustment proceeding, this Court declared unconstitutional the statute under which the proceeding had been brought, see *Ashton v. Cameron*

See *Neil v. Biggers*, 409 U. S. 188, 190-191 (1972). The federal courts, to be sure, are not without means for dealing with repetitious applications for habeas corpus,

County Water Improvement District, 298 U. S. 513 (1936). In *Chicot County*, this Court then held that the original decree was not open to collateral attack as void by the non-consenting bondholders who had had notice of the original readjustment proceeding but had there lodged no objection to the court's jurisdiction.

The decision can be seen as resting simply on the doctrine of *res judicata* to which the Court referred at points in its opinion, see 308 U. S., at 374-375. The plaintiffs in the second action had had a full and fair opportunity to litigate the issue of jurisdiction in the first proceeding, but had failed to do so. At the same time, there had been substantial action taken in reliance on the readjustment plan approved in the first proceeding. New bonds had been sold to the Reconstruction Finance Corporation which had then purchased old bonds in exchange for them. Under these circumstances it was both fair and proper to bar litigation of the jurisdiction issue in the collateral proceeding. Cf ALI Restatement of the Law of Judgments, § 10 and comment (1942).

But as has been pointed out, the doctrine of *res judicata* has no place in federal habeas corpus; rigid rules restricting what questions are open to litigation on collateral attack are inappropriate in the context of judgments affecting personal liberty. There are, of course, legitimate concerns with finality in criminal proceedings—both civil and military—and with the orderly functioning of independent judicial systems. But we have rules concerning exhaustion, waiver, and non-repetitious application to protect those concerns in the context of federal habeas corpus.

More generally, *Chicot County* is probably most appropriately interpreted as an early decision concerning the nonretroactive application of a particular decision, namely, *Ashton*. Despite the Court's resort at places to the rubric of *res judicata*, the presence of substantial reliance on pre-existing law clearly was an important consideration in the Court's decision not to allow the intervening decision in *Ashton* to be used to collaterally attack the original plan of readjustment. Furthermore, *Chicot County* was heavily relied upon by this Court when it gave the principles governing the retroactivity of new procedural constitutional rules full expression in *Linkletter v. Walker*, 381 U. S. 618, 625-626 (1965); and the case has been

see, e. g., *Salinger v. Loisel*, *supra*, at 231-232; 28 U. S. C. § 2244 (a)-(b), or with applications raising questions previously litigated in this Court, see 28 U. S. C. § 2244 (c). But no such problems are presented here. Rather, a procedural problem arises in this case because petitioner Gosa failed to assert the "jurisdictional" defect, which he now raises, in seeking leave for a direct appeal to the Court of Military Appeals. This reflects, in my view, a failure on the part of Gosa to satisfy the exhaustion requirement, which is applied in the context of collateral attack on federal habeas corpus, thereby raising a substantial question whether he has waived his right to challenge the "jurisdiction" of the court-martial on habeas corpus.

The exhaustion doctrine evolved in the context of collateral attack on state criminal proceedings. See, e. g., *Ex parte Hawk*, 321 U. S. 114 (1944); *Ex parte Royall*, 117 U. S. 241 (1886). It generally requires state petitioners to utilize available state court remedies before resorting to federal habeas corpus,¹⁸ and thus serves

cited as a retroactivity decision on a number of occasions since *Linkletter*, see *Chevron Oil Co. v. Huson*, 404 U. S. 97, 106 (1971); *United States v. United States Coin & Currency*, 401 U. S. 715, 742-743 (1971) (WHITE, J., dissenting); cf. *United States v. Estate of Donnelly*, 397 U. S. 286, 293-294 (1970); *id.*, at 299-300 (DOUGLAS, J., dissenting). Viewed then as a precursor of the present day retroactivity doctrine, *Chicot County* has no relevance for the threshold question whether Gosa is barred from raising his jurisdictional challenge on habeas corpus because he failed to present it in applying for leave to appeal to the Court of Military Appeals.

¹⁸ This rule does not, however, entitle the state courts to more than one opportunity to consider the same claim. Thus, in *Brown v. Allen*, 344 U. S. 443, 447 (1953), where the petitioners had presented their federal claims to the state courts on direct review, the Court said, "It is not necessary in such circumstances for the prisoner to ask the state for collateral relief, based on the same evidence and issues already decided by direct review" Indeed, if the exhaustion requirement were not restricted to providing all levels

both to ensure the orderly functioning of state judicial processes, without disruptive federal court intervention, and to allow state courts to fulfill their roles as co-equal partners with the federal courts in the enforcement of federal law, thus often eliminating the need for federal court action, and avoiding unnecessary friction between state and federal courts. These same considerations inhere in the context of collateral attack in federal court upon the judgments of military tribunals, which constitute a judicial system—a system with its own peculiar purposes and legal traditions—distinct from the federal judicial system much like the independent state judicial systems. Accordingly, this Court normally has required that military petitioners exhaust all available remedies within the military justice system. See *Noyd v. Bond*, 395 U. S. 683, 693 (1969); *Gusik v. Schilder*, 340 U. S. 128, 131–132 (1950).¹⁷ At the time petitioner Gosa initiated this collateral attack he indeed had not exhausted a military remedy which was formerly available to him with respect to the claim he now asserts. But that certainly ought not to be the end of the inquiry.

In *Fay v. Noia*, 372 U. S. 391 (1963), the Court rejected the position that a state prisoner who had not pursued his state appellate remedies was barred from seeking federal habeas corpus because of his failure to exhaust, where the state appellate remedies were no longer available. The Court concluded instead that the

of the state courts with an opportunity to hear his federal claim, it would effectively bar state prisoners from ever reaching a federal forum in States in which an unlimited number of identical applications for state post-conviction relief are permitted. The exhaustion requirement does not demand such “repetitious applications to state courts.” *Id.*, at 448–449 n. 3.

¹⁷ But see *McElroy v. Guagliardo*, 361 U. S. 281 (1960); *Reid v. Covert*, 354 U. S. 1 (1957); *Toth v. Quarles*, 350 U. S. 11 (1955); *Noyd v. Bond*, 395 U. S. 683, 696 n. 8 (1969).

exhaustion "requirement refers only to a failure to exhaust state remedies still open to the applicant at the time he files his application for habeas corpus in federal court." *Id.*, at 399. The Court established that where there has been a failure to resort to a state court remedy and that remedy is no longer available, the availability of federal habeas corpus would turn on whether there was a deliberate bypass of the state process. *Id.*, at 438. In determining whether such a bypass has occurred, the Court said that "[t]he classic definition of waiver enunciated in *Johnson v. Zerbst*, 304 U. S. 458, 464—'an intentional relinquishment or abandonment of a known right or privilege'—furnishes the controlling standard." *Id.*, at 439.

This Court has never considered the applicability of the nondeliberate bypass rule in the context of military petitioners. *Fay* does not speak specifically with respect to such petitioners. Nonetheless, the considerations which argue in favor of tempering the exhaustion requirement with a rule of nondeliberate bypass in the context of state petitioners are equally applicable in the context of military petitioners. Certainly, military petitioners should be encouraged to raise their constitutional claims before available military tribunals in order to ensure the orderly functioning of the system of military justice, to avoid needless federal court action, and to allow military tribunals an initial opportunity to correct their own errors. These interests are not subverted, however, by allowing a military petitioner to seek federal habeas corpus on the basis of a claim which he failed to raise before the military courts because he either was unaware of or did not otherwise willingly fail to raise that claim. As with state petitioners, the integrity of the exhaustion requirement is adequately protected by a rule prohibiting a deliberate bypass of an available military tribunal. A more stringent rule would serve only

to bar presentation of valid federal claims without any countervailing justification for doing so.

On the facts of this case, I find it impossible to conclude that petitioner Gosa has waived his right to challenge the "jurisdiction" of the court-martial which convicted him of rape on the ground that the offense was not service connected. A valid waiver requires the "intentional relinquishment . . . of a known right."¹⁸ At

¹⁸ Nothing in this Court's recent decisions in *Tollett v. Henderson*, — U. S. — (1973), and *Davis v. United States*, — U. S. — (1973), suggests that a different standard should be applied in the context of this case. *Tollett* involved a collateral attack upon the validity of a guilty plea in light of racial discrimination in the composition of the state grand jury that had indicted Henderson, an objection that had not been raised at the time of the entrance of the plea. Because it was clear that neither Henderson nor his counsel were aware of the claim of discrimination at the time of the plea, the Court agreed that there had been no valid waiver of the claim in traditional terms, see — U. S., at —, but the Court did not consider that determination dispositive in the peculiar context of a collateral attack upon a guilty plea. Rather, the Court ruled that "[t]he focus of federal habeas inquiry is the nature of the advice and the voluntariness of the plea, not the existence as such of an antecedent constitutional inquiry," *id.*, at —. We, of course, do not deal here with the special problem of a collateral attack upon a guilty plea.

In *Davis*, the Court held that, for purposes of collateral attack, a petitioner had waived his objection to the composition of the grand jury that tried him because he had failed to raise the objection before trial as Fed. Rule Crim. Proc. 12 (b) (2) expressly requires. Rule 12 (b) (2) specifies that "[d]efenses and objections based on defects in the institution of the prosecution or in the indictment . . . may be raised only by motion before trial" and that failure to do so "constitutes a waiver thereof." Confronted with a situation in which a specific rule provided "for the waiver of a particular kind of constitutional claim if it be not timely asserted," — U. S., at —, the Court concluded that preservation of the integrity of the Rule demanded that its standard should govern in the context of a collateral attack upon an indictment. This case, however, involves no such "express waiver provision," *id.*, at —, and consequently

the time of petitioner's 1967 application for review by the Court of Military Appeals the substantial "jurisdictional" issue that he now raises had yet to be addressed by this Court. While *O'Callahan* is, to be sure, properly viewed as one further step in the ongoing process of establishing the limits of court-martial jurisdiction, see *supra*, at —, I do not think it follows that we should impose a rule of waiver so strict that it requires an individual petitioner to anticipate, at the time he appeals, a particular constitutional ruling of this Court that has yet to be rendered, especially not when the protection of a number of guarantees of the Bill of Rights are at stake. Moreover, where a new constitutional rule has been established following completion of regular proceedings in the military courts, the interests served by the exhaustion requirement can be fully satisfied by requiring that the subsequently identified claim first be presented to the military courts if a means, such as post-conviction relief,¹⁹ exists for doing so. Cf. *Blair v. California*, 340 F. 2d 741 (CA9 1965); *Pennsylvania ex rel. Raymond v. Rundle*, 339 F. 2d 598 (CA3 1964). Yet if it is clear that those courts would reject the claim, such post-conviction resort to the military courts would, of course, be futile and is therefore unnecessary, see *Gusik v. Schilder*, 340 U. S. 128, 132-133 (1950). This is now the case here, for during the pendency of this action the Court of Military Appeals, in *Mercer v. Dillon*, 19 U. S. C. M. A. 264, 41 C. M. R. 264 (1970), held that the "jurisdictional" principle announced in *O'Callahan* did not apply to cases decided before the date of the *O'Callahan* decision. It therefore became clear that it would be pointless to

the general waiver principles established by this Court's previous decisions must control.

¹⁹ See *Developments in the Law—Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1234 (1970); cf. *Noyd v. Bond*, 395 U. S. 683, 695 n. 7 (1969).

dismiss petitioner Gosa's application in order to allow him to present his claim to the military courts,²⁰ and consequently, his challenge to the "jurisdiction" of the court-martial that tried him is now properly before this Court.

Since I then cannot agree with the opinion of either the plurality or MR. JUSTICE DOUGLAS, I dissent.

²⁰ In any case, while his application for habeas corpus was pending in the District Court, petitioner Gosa filed a motion to vacate his conviction and sentence, on the basis of *O'Callahan*, in the Court of Military Appeals. Subsequent to the denial of relief in the District Court, the Court of Military Appeals, treating petitioner's motion as a petition for reconsideration, also denied relief. It did so not on the basis that Gosa had waived the "jurisdictional" question by failing to present it on direct appeal, but on the basis of its previous decision in *Mercer* holding *O'Callahan* to be nonretroactive. 19 U. S. C. M. A. 327, 41 C. M. R. 264 (1970). Thus, in all events, it seems clear that Gosa has now adequately exhausted his military remedies and his previous by-pass can no longer be deemed a waiver of the "jurisdictional" question, see *Warden v. Hayden*, 387 U. S. 294, 297 n. 3 (1967).